

# Washington International Law Journal

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Volume 26  
Number 1 *Special Issue on the Japanese  
Constitution*

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1-1-2017

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### Recommended Citation

Carl F. Goodman, *Contemplated Amendments to Japan's 1947 Constitution: A Return to Iye, Kokutai and the Meiji State*, 26 Wash. L. Rev. 17 (2017).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol26/iss1/4>

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## CONTEMPLATED AMENDMENTS TO JAPAN'S 1947 CONSTITUTION: A RETURN TO IYE, KOKUTAI AND THE MEIJI STATE

Carl F. Goodman

### INTRODUCTION

The post World War II American Occupation of Japan was a huge programmatic success. Its disarmament,<sup>1</sup> repatriation,<sup>2</sup> land reform,<sup>3</sup> and health programs<sup>4</sup> put a defeated Japan on the road to recuperation, while providing a military shield that enabled Japan to focus on recovery from the War and rebuilding the country and economy.<sup>5</sup> Perhaps its most enduring legacy was its Enlightenment-based, American-drafted, rights-oriented Constitution of 1947 [hereinafter “the Constitution”].<sup>6</sup> Drafted in English, the Constitution was promulgated in Japanese, resulting in some substantive changes. Among the most important of these were changing the English

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<sup>1</sup> See GEOFFREY PERRET, *OLD SOLDIERS NEVER DIE* 495 (1996); GEORGE DAVIES, *THE OCCUPATION OF JAPAN* 293–94 (2001); LAW LIBRARY OF CONGRESS, *JAPAN: ARTICLE 9 OF THE CONSTITUTION* (2006), <http://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf>.

<sup>2</sup> By 1949 over 6 million Japanese had been repatriated to Japan. Paul J. Mueller, *Occupied Japan -- A Progress Report*, U.S. ARMY (Aug. 27, 2007), <http://www.army.mil/article/4613/>.

<sup>3</sup> See Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* 32 (World Bank Policy Research, Working Paper No. 2111, 1999), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2111>; Tsutomu Takigawa, *Historical Background of Agricultural Land Reform in Japan*, 10 *THE DEVELOPING ECONOMIES* 290, 290 (1972), <http://onlinelibrary.wiley.com/doi/10.1111/j.1746-1049.1972.tb00283.x/pdf>; MIKISO HANE & LOUIS G. PEREZ, *MODERN JAPAN: A HISTORICAL SURVEY* 371 (4th ed. 2009); HOWARD B. SCHONBERGER, *AFTERMATH OF WAR: AMERICANS AND THE REMAKING OF JAPAN, 1945–1952*, at 65–66 (1989); WILLIAM MANCHESTER, *AMERICAN CAESAR*, 508–509 (1978); PERRET, *supra* note 1, at 520–521; Masahiro Takada, *Japan's Economic Miracle: Underlying Factors and Strategies for the Growth* (Mar. 23, 1999) (unpublished student research paper, Lehigh University) (on file with Professor Raymond F. Wylie, Lehigh University), <http://www.lehigh.edu/~rfw1/courses/1999/spring/ir163/Papers/pdf/mat5.pdf>.

<sup>4</sup> See Crawford F. Sams, *Experiences in Immunization Against Tuberculosis with BCG Vaccine in Japan*, 44 *AM. J. PUB. HEALTH* 903, 903–908 (1954); Sey Nishimura, *Promoting Health During the American Occupation of Japan: The Public Health Section, Kyoto Military Government Team, 1945–1949*, 98 *AM. J. PUB. HEALTH* 424, 424–434 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2253585/>; SETH G. JONES ET AL., *SECURING HEALTH: LESSONS FROM NATION-BUILDING MISSIONS* 61–64 (2006) (ebook); SEYMOUR MORRIS JR., *SUPREME COMMANDER: MACARTHUR'S TRIUMPH IN JAPAN* 102–114 (2014); MANCHESTER, *supra* note 3, at 509; DAVIES, *supra* note 1, at 296.

<sup>5</sup> Japan and the Occupation received assistance from an unexpected source—the North Korean invasion of South Korea jump-started the Japanese economy.

<sup>6</sup> While drafted by the Kades Committee set up by the Occupation, the drafting was influenced by indigenous Japanese drafts. THEODORE MCNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* 60–61, 98–99 (2000).

word “people” into the Japanese “*kokumin*” (Japanese citizens)<sup>7</sup> and transmuting many definitive rights into more passive language.<sup>8</sup>

Many in Japan’s political leadership seek to change the American-drafted Constitution by bringing it closer to the indigenous Japanese postwar draft (Matsumoto draft) that was seen by the American Occupation [hereinafter “the Occupation”] as containing merely minor amendments to the pre-war Meiji Constitution. The 1947 Constitution’s Amendments Clause requires a two-thirds majority of both the Lower and Upper House before an amendment can be presented to the public for a referendum vote. At referendum each amendment must be voted on separately, a simple majority is required for passage.<sup>9</sup> In 1955, the Liberal Democratic Party (LDP) (Japan’s dominant party) was formed through a merger of the postwar Liberal and Democratic Parties brokered by Yoshida Shigeru, Hatoyama Ichiro, and Kishi Nobusuke to respond to the merger of Japan’s left wing Socialist leaning parties, and to try to achieve a conservative two-thirds majority in both Diet Houses.<sup>10</sup> The LDP, while Japan’s dominant political party since 1955, never achieved the two-thirds majority needed. In Abe’s second term as Prime Minister, the LDP obtained a two-thirds majority in the Lower House and together with small parties favoring constitutional amendment, obtained a two-thirds majority in the Upper House that supports some amendment—Prime Minister Abe (Kishi’s grandson) is pressing for constitutional amendment in 2017.<sup>11</sup>

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<sup>7</sup> See STATE-WAR-NAVY COORDINATING COMM., DECISION AMENDING SWNCC 228: REFORM OF THE JAPANESE GOVERNMENTAL SYSTEM (Jan. 7, 1946), <http://www.ndl.go.jp/constitution/e/shiryo/03/059/059tx.html>; Memorandum from Charles L. Kades, Chief, Pub. Admin. Div., to Chief, Gov’t Section, 2 (Feb. 12, 1946), [http://www.ndl.go.jp/constitution/e/shiryo/03/002\\_15/002\\_15\\_0011.html](http://www.ndl.go.jp/constitution/e/shiryo/03/002_15/002_15_0011.html) (last updated Mar. 21, 2013). The Meiji Constitution’s rights provisions were also limited to Japanese citizens. HAROLD S. QUIGLEY, JAPANESE GOVERNMENT AND POLITICS 52–53 (1932); HIROBUMI ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 38–40 (Miyoji Ito ed. 1979) (1889).

<sup>8</sup> See KYOKO INOUE, MACARTHUR’S JAPANESE CONSTITUTION 73–80 (1991).

<sup>9</sup> NIHONKOKU KENPŌ [hereinafter “KENPŌ”] [CONSTITUTION], art. 96 (Japan). The Referendum Law provides that majority means majority of votes cast, although question exists as to whether majority requires a majority of eligible voters. Motonari Imaseki, *Act Concerning Procedures to Revise the Constitution of Japan*, in WASEDA U. INST. COMP. L.: JAPANESE L. INFO. (Mar. 15, 2008), [http://www.waseda.jp/hiken/en/jalaw\\_inf/new\\_leg/001imaseki.html](http://www.waseda.jp/hiken/en/jalaw_inf/new_leg/001imaseki.html).

<sup>10</sup> WATANABE TSUNEO, JAPAN’S BACKROOM POLITICS: FACTIONS IN A MULTIPARTY AGE 239–41 (Robert D. Eldridge trans. 2013) (1967).

<sup>11</sup> The supermajority requirement helps assure basic human rights and structural democracy rights in the face of emotions at a particular point in time. The LDP’s contemplated amendments would do away with supermajority protection of democracy and people’s rights. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 192 (2013). The Meiji Constitution’s amendment provision required a presentation by the Emperor to the Diet and b. supermajority provisions for both quorum and vote requirements in the Diet. DAI NIHON TEIKOKU KENPŌ [hereinafter “MEIJI KENPŌ”] [CONSTITUTION], art. 73

The Constitution's Renunciation of War Clause has long been the face of the LDP's constitutional amendment drive, but the LDP has much more on its amendment plate.<sup>12</sup> Indeed, because of the Cabinet Declaration of 2014 that reinterpreted Article 9 to allow Japan to engage in "collective Self Defense" and subsequent legislative and administrative changes designed to carry out collective self-defense with the United States, it is likely that "formal amendment" of Article 9 will take a back seat to other amendments on the LDP's list.

This paper discusses some major amendments the LDP is contemplating and examines the interaction of amendments that makes them more than separate proposals. The terms of amendments that will be submitted to the Diet will be determined through discussions between Japan's political parties. However, enough is known to examine how the changes contemplated permit legislative and/or executive action restricting the rights of the Japanese people opening the door to returning Japanese society to its pre-war autocratic Meiji Constitution past. This paper examines the amendments with an eye on Japanese history, customs, and law.<sup>13</sup>

Part I briefly discusses Japan's constitutional history. Part II discusses how contemplated amendments to the Preamble, Emperor provisions, individuality, the family, and free speech and association could affect Japanese law and society. Part III presents a short summary.

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(Japan). Hirobumi Ito justified such stringency by pointing out the special nature of a Constitution. HIROBUMI ITO, *supra* note 7, at 153–55.

<sup>12</sup> KENPŌ, art. 9 ("Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.").

<sup>13</sup> For English language translation of portions of the LDP's 2012 draft constitution, see Jiyumintō, Shinkenpō sōan [New Draft Constitution], Oct. 28, 2005, at [www.jimin.jp/jimin/shin\\_kenpou/shiryuu/pdf/051028\\_a.pdf](http://www.jimin.jp/jimin/shin_kenpou/shiryuu/pdf/051028_a.pdf) [hereinafter LDP Draft]; Young Lawyer's Association for The Future of Freedom translation of 2012 draft proposal, (Nov. 1, 2013), <http://www.asuno-jiyuu.com/2013/11/blog-post.html>; Voices of Overseas Youth for Civic Engagement, *Draft for the Amendment of the Constitution of Japan*, VOYCE (Mar. 17, 2016), <http://www.voyce-jpn.com/ldp-draft-constitution>; Colin P.A. Jones, *The LDP constitution, article by article: a preview of things to come?*, JAPAN TIMES, Jul. 2, 2013, <http://www.japantimes.co.jp/community/2013/07/02/issues/the-ldp-constitution-a-preview-of-things-to-come/#.Vp-RNIf2bIV>; Lawrence Repeta, *Japan's Democracy at Risk – The LDP's Ten Most Dangerous Proposals for Constitutional Change*, 11 ASIA-PAC. J. JAPAN FOCUS 28, 3 (2013), <http://www.japanfocus.org/-Lawrence-Repeta/3969>.

## I. JAPAN'S CONSTITUTIONAL HISTORY

### A. *The Adoption of the Meiji Constitution*

With his victory at the Battle of Sekigahara (October 1600), Tokugawa Ieyasu defeated the forces of Western Japan who supported the son of Toyotomi Hideoshi, the man who unified Japan during the 16th Century. In 1603, the Emperor granted Tokugawa the title of Shogun and the Tokugawa clan then ruled Japan for the next two and a half centuries. The arrival of American war ships under the command of Commodore Perry (July 1853) who demanded trade ties between Japan and the United States—a demand that the Tokugawa regime lacked the power to resist—together with built up animosity, especially in Western Japan, eventually led to civil war in which the rebels rallied under the demand for restoration of the Emperor's power. In 1868, the Emperor announced the restoration of his power (Meiji Restoration) and effective rule passed to Western Japan Samurai, principally from Satsuma and Chosen Han. Dispute arose as to whether a constitution should be promulgated. The Emperor had promised in his Charter Oath of Five Articles (1868) that there would be “deliberative assemblies” but the abolition of the pre restoration feudal structure abolished feudal councils that could serve this purpose. A constitutionally created legislative body was seen as the means for carrying out the promise of deliberative assemblies.<sup>14</sup> By 1879, an agreement was reached between the competing camps, and ten years later, the Emperor granted his subjects Japan's first modern constitution,<sup>15</sup> the Constitution of the Empire of Japan<sup>16</sup> (hereinafter “Meiji Constitution”). Ito Hirabumi, the principle author of the Meiji Constitution, specifically rejected the liberal American model of governance and instead chose a conservative German model.<sup>17</sup> Seeking to

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<sup>14</sup> JOHN K. FAIRBANK, EDWIN O. REISCHAUER & ALBERT M. CRAIG, *EAST ASIA TRADITION AND TRANSFORMATION* 503, 535 (1973).

<sup>15</sup> The Seventeen Article Constitution of Prince Shotoku written in the very early 7th century is reputed to be the first constitutional document of Japan. Unlike constitutional documents in the West, it did not set forth rights vis-à-vis the government but rather was Confucian in nature, setting forth ethical and moral standards of conduct. While referred to as a constitution, it was neither supreme law nor would it be considered ‘law’ in a Western sense. DAVID J. LU, *JAPAN: A DOCUMENTARY HISTORY* 22–23 (1997).

<sup>16</sup> See 42 *ASIATIC SOC'Y OF JAPAN, JAPANESE GOVERNMENT DOCUMENTS*, 1, 8 n.1 (W.W. McLaren ed. 1979) (1914).

<sup>17</sup> See QUIGLEY, *supra* note 7, at 39–40, 44; E. HERBERT NORMAN, *INT'L SECRETARIAT INST. OF PAC. RELATIONS, FEUDAL BACKGROUND OF JAPANESE POLITICS: SECRETARIAT PAPER NO. 9*, at 90–98 (1945), *microformed on* Chapter IV The Autocratic State (Univ. Microfilms Int'l 1978); IAN BURUMA, *INVENTING JAPAN: 1853-1964*, at 52–54 (2003); CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* 64 (2004).

thread a needle between the Emperor as supreme power in the State and the Emperor as a constitutional monarch (consistent with evolving international doctrine), Ito wrote both theories into the Constitution.<sup>18</sup>

While the Meiji Constitution contained a listing of “Rights and Duties of Subjects,” these rights were not self-executing, and rather required legislation that defined the scope and limitations of the granted rights.<sup>19</sup> The Meiji Constitution allowed a form of democracy but did not compel it. It appears similar to Westminster Democracy, but is different because Ministers of State were advisors to and served at the discretion of the Emperor; they were neither appointed by nor dependent on<sup>20</sup> the confidence of the Diet.<sup>21</sup> Moreover, the Cabinet acted on a consensus basis so that if a single Cabinet Minister dissented or resigned, the Cabinet would be dissolved and a new Cabinet appointed by the Emperor. Since the army and navy were entitled to two seats on the Cabinet that, by regulation, could only be held by active duty senior officers, the military was in a commanding position.<sup>22</sup> Military Chiefs of Staff, like their Cabinet Minister counterparts, were responsible solely to the Emperor and not to the Cabinet or military officers serving as Cabinet Ministers. Commanders in the field held allegiance to their Chief of Staff, not to the civil government or the military appointees serving in the Cabinet, leading to a breakdown in rank discipline that spread throughout the ranks, including mid-level officers. Within the military there were “constitutional” disagreements—Chiefs of Staff considered the Cabinet and the military’s representatives serving in the

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<sup>18</sup> See, e.g., MEIJI KENPŌ, art. 3 (“The Emperor is sacred and inviolable.”); *id.* art. 4 (“The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.”); *id.* art. 5 (“The Emperor exercises the legislative power with the consent of the Imperial Diet.”); *id.* art. 9 (“The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.”); STEPHEN S. LARGE, *EMPERORS OF THE RISING SUN: THREE BIOGRAPHIES* 43 (1997).

<sup>19</sup> See, e.g., MEIJI KENPŌ, art. 23 (“No Japanese subject shall be arrested, detained, tried or punished, unless according to law.”); *id.* art. 28 (“Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.”); *id.* art. 29 (“Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.”).

<sup>20</sup> *Id.* art. 55, para. 1 (“The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.”).

<sup>21</sup> See HIROBUMI ITO, *COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN* 102–05 (Miyoji Ito trans., Chū-ō Daigaku ed. 1906) (1889).

<sup>22</sup> LARGE, *supra* note 18, at 42.

Cabinet as lacking authority over operational matters and thus not having authority over the Chiefs of Staff.<sup>23</sup>

The Meiji Constitution *could* be interpreted as granting freedoms and *might* be interpreted to allow a responsible representative government. Some in pre-war Japan argued for such an interpretation but the reality was that the Meiji Constitution was not interpreted to grant rights that could not be infringed by legislation nor did the elected branch of the Diet control the selection of the prime minister. Dissenters among the Meiji Revolutionaries either resigned or were forced out of government and formed political parties.

*B. Restrictions on Constitutional Rights During the Short Lived Taisho Democracy Period*

After the death of Emperor Meiji and the accession of Emperor Taisho, a period of so-called Taisho Democracy came into existence in Japan. During this period, which flourished in the 1920s but lasted a mere eight to twelve years, there were some democratic stirrings and political party dominated governments, but basic freedoms such as freedom of speech, association, and the press were, for the most part, unavailable to the Japanese public.<sup>24</sup> An amended Peace Preservation Law, an update and modification of the laws that restricted freedom of speech and association that had been adopted in the interregnum between the Restoration and adoption of the Constitution,<sup>25</sup> sharply restricted freedom of speech and assembly as an antidote to the Universal Male Suffrage Law.<sup>26</sup>

In the post-Taisho period (1930s), the “organ theory” or the idea that the Emperor was a constitutional monarch subject to the Constitution,<sup>27</sup> was rejected in favor of *Kokutai*, the theory that the Emperor was the essence of the State and that all Japanese people held a relationship to the Kami of Shinto religion and to the Emperor through the Kami.<sup>28</sup> Professor Minobe, a strong supporter of the organ theory, was physically attacked and compelled

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<sup>23</sup> W.G. BEASLEY, *THE RISE OF MODERN JAPAN 171–72* (3d ed. 2000) (1990).

<sup>24</sup> Alternating political party governments served from 1925 to 1932. LARGE, *supra* note 18, at 109.

<sup>25</sup> See BURUMA, *supra* note 17, at 48–49, 54–55.

<sup>26</sup> See Richard H. Mitchell, *Japan's Peace Preservation Law of 1925: Its Origins and Significance*, in 28 *MONUMENTA NIPPONICA* 317, 317–345 (1973).

<sup>27</sup> See Kenneth Colegrove, *The Japanese Emperor*, 26 *AM. POL. SCI. REV.* 642, 648–653 (1932).

<sup>28</sup> See generally ROBERT S. ELLWOOD & RICHARD PILGRIM, *JAPANESE RELIGION: A CULTURAL PERSPECTIVE* (1985) (noting that kami spirits not only adhere to the natural world but also to the original Japanese clans, each of which had its own kami—the most important of which was the kami for the Imperial clan).



to resign from his position at Tokyo University and from the Diet's Upper House,<sup>29</sup> notwithstanding the Emperor's support of his theory.<sup>30</sup>

C. *The Occupation's Constitutional Objectives and the 1947 Constitution*

To the Occupation [SCAP (Supreme Commander Allied Powers) which, while it applied to General MacArthur was how the Occupation was referred to], whose marching orders were contained in the Potsdam Declaration and a joint War and State Department policy paper (Initial Post Surrender Policy Directive for Japan<sup>31</sup> and its revisions),<sup>32</sup> the constitution Japan needed was not one that *could be* interpreted to allow for individual rights and a democratic representative form of government; it was one that *required* a representative democracy and recognition of basic human rights.

The Occupation sought a Japanese-drafted constitution centered on gender equality, representative democracy, and freedom of thought, speech and religion.<sup>33</sup> Prime Minister Shidehara turned to a committee headed by Matsumoto Joji, whose draft was considered by the Occupation as an inadequate minor amendment to the Meiji Constitution.<sup>34</sup> When the Matsumoto draft was made public it was doomed, as it not only failed to represent the Occupation's goals, but also failed to conform to Japanese public opinion, which sought a real change from the Meiji Constitution that would grant freedoms to the public.<sup>35</sup> What the Occupation (and the

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<sup>29</sup> For a portion of Minobe's defense, see 2 SOURCES OF JAPANESE TRADITION 239–246 (Ryusaku Tsunoda, Wm. Theodore De Bary & Donald Keene eds., text ed. 1964). For a discussion of the Minobe Affair and its free-speech and military vs. civil authority aspects, see GREGORY J. KASZA, *THE STATE AND THE MASS MEDIA IN JAPAN, 1918–1945*, at 129–137 (1988); MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 597 (2000); BEASLEY, *supra* note 24, at 184–186. For a discussion of the change in orthodoxy that led to Minobe's downfall, see Christopher Goto-Jones, *The Way of Revering the Emperor: Imperial Philosophy and Bushidō in Modern Japan*, in *THE EMPERORS OF MODERN JAPAN* 23, 35–36 (Ben-Ami Shillony ed., 2008).

<sup>30</sup> LARGE, *supra* note 18, at 155.

<sup>31</sup> See Initial Post Surrender Policy for Japan, *State Department Bulletin* (Sept. 23, 1945); United States Initial Post-Surrender Policy for Japan (SWNCC150/4), Memorandum from H. Freeman Matthews to the State-War-Navy Coordinating Committee (Sep. 6, 1945), <http://www.ndl.go.jp/constitution/shiryō/01/022/022tx.html>.

<sup>32</sup> See State-War-Navy Coordinating Committee, Decision Amending SWNCC 228: Reform of the Japanese Government System (Jan. 7, 1946), [http://www.ndl.go.jp/constitution/e/shiryō/03/059/059\\_0051.html](http://www.ndl.go.jp/constitution/e/shiryō/03/059/059_0051.html).

<sup>33</sup> Charles L. Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 *Pol. Sci. Q.* 215, 219 (1989).

<sup>34</sup> Memorandum from Charles L. Kades to the Chief, Government Section (Feb. 12, 1946), [http://www.ndl.go.jp/constitution/e/shiryō/03/002\\_15/002\\_15\\_0011.html](http://www.ndl.go.jp/constitution/e/shiryō/03/002_15/002_15_0011.html).

<sup>35</sup> David S. Law, *The Myth of Imposed Constitutionalism in Japan*, in *SOCIAL AND POL. FOUNDATIONS OF CONSTITUTIONS* 255–57 (Dennis J. Galligan & Mila Versteeg eds., 2013).



Japanese public) wanted was a constitution that protected individual rights.<sup>36</sup> General MacArthur turned the creation of a roadmap for a constitution over to General Whitney of SCAP's government section, giving him general instructions: a powerless Emperor; no military, whether for defensive or offensive purposes; elimination of remnants of feudalism; and a reformed budget process. Whitney turned the matter over to Colonel Kades who was given one week to prepare a road map for a Constitution. Kades was to be guided by the latest version of the joint War/State Department policy paper for the Occupation, now known as SWNCC 228, the Potsdam Declaration and MacArthur's summary instructions.<sup>37</sup>

The Kades' committee draft, after some modifications and changes suggested by the Japanese government and others, brought about by virtue of translation from English to Japanese, was presented by the Emperor to the Diet. SCAP agreed to select modifications suggested by the Japanese government and accepted few suggestions made by the Far East Commission. Some translation "errors" in the Japanese government's translation of the Kades draft that *were caught and rejected by the Occupation* would have subordinated constitutional individual rights to legislation, retained some imperial powers, and allowed executive rule in emergency situations.<sup>38</sup> As set forth in greater detail in Part II hereof, the LDP's proposed amendments under consideration in this paper could have the effect of subordinating constitutional rights to legislation, give powers to the Emperor and would provide for emergency powers that could, at least temporarily, displace democracy in favor of rule by Cabinet orders that must be obeyed by the public.

The 1947 Constitution retains a dynastic Emperor as a symbol of the State, places sovereignty solely in the People, renounces war, and gives the judicial branch the power of constitutional judicial review. In addition, it provides for a representative democracy where the executive is appointed by and subject to retention by confidence of an elected legislative branch. The Constitution seeks to remove the vestiges of feudalism through structural changes in the governing system and the numerous rights granted to the Japanese people. The requirement for supermajority consent of the

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<sup>36</sup> See TAKESHI MASUDA, *SOFT POWER AND ITS PERILS: U.S. CULTURAL POLICY IN EARLY POSTWAR JAPAN AND PERMANENT DEPENDENCY* 217–18 (2007).

<sup>37</sup> KOSEKI SHOOICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* 79 (Ray A. Moore ed., 1997); Kades, *supra* note 33; ALFRED C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK* (1976); JANSEN, *supra* note 29; PETER J. HERZOG, *JAPAN'S PSEUDO-DEMOCRACY* (1993).

<sup>38</sup> DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 540, (2002).

legislative branch, plus majority consent of the people for constitutional amendment, was designed to create a legislative branch supermajority hurdle that would protect the Constitution from intemperate changes, while requiring consent of the people through direct referendum of any changes suggested by elected leaders. While the Occupation stated it was not forcing acceptance of its draft, it also stated it was prepared to submit the basic ideas of its draft directly to the Japanese people if the government rejected them and held out the prospect of charging the Emperor as a war criminal if the Constitution was rejected.<sup>39</sup>

The Emperor submitted the Constitution to the Diet as an amendment of the Meiji Constitution. After some amendments (accepted by the Occupation) made during Diet consideration, it was approved and has never been subject to formal amendment.

## II. THE LDP'S CONTEMPLATED AMENDMENTS

### A. *Granting the Cabinet the Power to Govern by Cabinet Order in a Prime Minister Declared Emergency*

Under the Meiji Constitution, the Emperor could, in cases of urgent necessity arising when the Diet was not in session, issue imperial ordinances that had the force and effect of law but needed to be confirmed by the Diet when it returned.<sup>40</sup> This power was used to stifle freedom of speech and the press when capital punishment and life imprisonment for forming or joining an organization that sought to change *Kokutai* (even by peaceful means) were added to the Peace Preservation Law by emergency order.<sup>41</sup> The 1947 Constitution made the legislative branch the supreme organ of the State and has no emergency provision. The Diet is the only branch whose entire membership is elected to enable it to represent all the people.<sup>42</sup> The proposed amendment to grant the Cabinet the power to govern by Cabinet

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<sup>39</sup> Kades, *supra* note 33, at 215, 229–232.

<sup>40</sup> Article 8 of the Constitution of the Empire of Japan (MEIJI KENPŌ) provided “Article 8. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law. (2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.” Diet sessions were only three months long and the Emperor was under no duty to call the Diet back into session during an emergency. See Colegrove, *supra* note 27, at 642, 655.

<sup>41</sup> QUIGLEY, *supra* note 7, at 58–59; KASZA, *supra* note 29, at 45 (Kasza notes that the Emergency Power was exercised on four occasions to restrict press freedom – pg. 13); Colegrove, *supra* note 27, at 642, 658–659 (1932).

<sup>42</sup> KENPŌ art. 41, 43.

order in an emergency declared by the Prime Minister is seen by the LDP as noncontroversial and easily acceptable by a populous still traumatized by the Great East Japan Earthquake and Tsunami.<sup>43</sup>

The LDP's considered amendment harkens back to the Meiji Constitution's grant of power to the Emperor and would allow the Cabinet, after a Prime Minister declared emergency, to rule via Cabinet orders having the effect of law and would compel people in Japan to carry out orders issued by the State (and subordinate agencies of the State).<sup>44</sup> It appears the amendment will be presented as a minor change that would allow the government to call the Diet back in session in the event of an emergency, but it is far more.<sup>45</sup> The Constitution already allows the Cabinet to call special Diet sessions and twenty-five percent of the membership of either House of

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<sup>43</sup> The LDP has been considering making the emergency clause amendment the first in a series of rolling amendments to be placed before the Diet. The public, believing this amendment will be easy to achieve, will make the process of amendment publicly acceptable and "normal," thus paving the way for other amendments that are seen as potentially more polarizing. However, the recent unprecedented address by the Emperor, in which he hinted at his desire to retire (abdicate) in favor of his eldest son and the failure of the Constitution to provide for abdication, has led some to believe that a constitutional amendment may be required to allow abdication (although it can reasonably be argued that all that is needed is a change in the Imperial Household Law). Should the LDP conclude that an abdication amendment is required, then such an amendment would probably be the first amendment to be debated by the Diet and presented to the public. Allowing abdication is contentious as there is some objection to permitting the Emperor to abdicate. Considering an abdication amendment may open the door to simultaneous consideration of amendments dealing with the Emperor that the LDP is contemplating, and that may implicate the question of succession. This is a very contentious issue, as the failure to find agreement among LDP factions on how to deal with the succession crisis that loomed prior to the birth of a male heir to the Emperor's youngest son. All of which could set back Prime Minister Abe's schedule and time table for Constitutional Amendment. See Anna Fifield, *Japan's Emperor Wants to Retire: Is He Allowed To?*, WASH. POST (Aug. 6, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/japans-emperor-wants-to-retire-is-he-allowed-to/2016/08/05/12199b6c-58d7-11e6-8b48-0cb344221131\\_story.html](https://www.washingtonpost.com/world/asia_pacific/japans-emperor-wants-to-retire-is-he-allowed-to/2016/08/05/12199b6c-58d7-11e6-8b48-0cb344221131_story.html); see also, *Full Text of Emperor Akihito's Video Message*, MAINICHI (Aug. 8, 2016), <http://mainichi.jp/english/articles/20160808/p2a/00m/0na/008000c>; Opinion, *Abdication Could Pose Legal Challenges for Imperial System*, MAINICHI (Aug. 8, 2016), <http://mainichi.jp/english/articles/20160808/p2g/00m/0dm/073000c>; Elaine Lies, *Japan Emperor Abdication Debate Could Stir Discussion on Female Succession*, REUTERS (July 14, 2016), <http://www.reuters.com/article/us-japan-emperor-idUSKCN0ZU0AE>.

<sup>44</sup> Lawrence Repeta, *Japan's Democracy at Risk – The LDP's Ten Most Dangerous Proposals for Constitutional Change*, 11 ASIA-PAC. J. JAPAN FOCUS 28, 3 (2013), <http://www.japanfocus.org/-Lawrence-Repeta/3969>; Colin P.A. Jones, *The LDP constitution, article by article: a preview of things to come?*, JAPAN TIMES (July 2, 2013), <http://www.japantimes.co.jp/community/2013/07/02/issues/the-ldp-constitution-a-preview-of-things-to-come/#.Vp-RNIf2bIV>; Voices of Overseas Youth for Civic Engagement, *Draft for the Amendment of the Constitution of Japan*, VOYCE, <http://www.voyce-jpn.com/ldp-draft-constitution> (contemplated new Articles 98 and 99).

<sup>45</sup> LDP Proposes Prioritizing Debate on Contingencies in Revising Constitution, MAINICHI (May 8, 2015), <http://mainichi.jp/english/english/newsselect/news/20150508p2a00m0na010000c.html>.

the Diet may require the Cabinet to decide whether to hold such a session.<sup>46</sup> In times of national emergency, when the Diet has been dissolved, the Cabinet may call the Upper House back into emergency session to enact provisional measures that become permanent only if approved within 10 days of the Lower House returning.<sup>47</sup> The LDP's contemplated proposal contains what James Madison characterized as the seeds of "tyranny," by combining the legislative, judicial, and executive power in the hands of a small select group.<sup>48</sup> The Cabinet as specified in the proposal, requires only a bare majority of members be elected officials, and all members must be appointed by and serve at the Prime Minister's pleasure.<sup>49</sup>

The Diet can expand the definition of "emergency" beyond the already broad circumstances established in the LDP proposal. Expansions could result from armed attacks, social disorder from internal insurrections or other reasons, or natural disasters. Moreover, the LDP contemplated proposal, consistent with emergency amendments designed to increase the power of a ruling elite,<sup>50</sup> contains few limits on actions of the "Emergency Cabinet."<sup>51</sup> Strikingly, none of the protections that modern democracies use to cabin an Emergency Clause are present in the LDP proposal.<sup>52</sup>

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<sup>46</sup> KENPŌ art. 53 ("The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.")

<sup>47</sup> *Id.*, at 54, para. 2–3 "When the House of Representatives is dissolved, the House of Councillors [sic] is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors [sic] in emergency session. Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten days after the opening of the next session of the Diet."

<sup>48</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>49</sup> KENPŌ art. 68, para. 2–3 "The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet. The Prime Minister may remove the Ministers of State as he chooses."

<sup>50</sup> Christian Bjørnskov & Stefan Voigt, *The Determinants of Emergency Constitutions* 17–28, 31 (Mar. 23, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2697144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697144).

<sup>51</sup> See Voices of Overseas Youth for Civic Engagement, *supra* note 44; Jones, *supra* note 44.

<sup>52</sup> The contemplated clause does not do any of the following: separate the declaring authority from the executing authority (the Prime Minister declares an emergency and his handpicked Cabinet executes the emergency powers); require the legislative Branch immediately to be called into session to approve or reject the declaration, and remain in session to review future Cabinet Orders; list freedoms that are exempt from Executive limitations; provide judicial review of the declaration or actions taken there under. The contemplated clause also does not distinguish between emergencies and situations needed when the existence of the State is threatened (e.g., war launched against Japan), and those that may require short term immediate action, such as natural disasters. It also does not define the reason why a Declaration is required (e.g., to uphold the democratic rights of the public), nor does it protect human rights or democracy. See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 40–46, 54–63 (James Crawford et al. eds., 2006).

Catastrophes, such as the Great East Japan Earthquake and Tsunami, could have been sufficient to set aside democratic rule. Perhaps an oil embargo, such as the pre-Pacific War American Embargo<sup>53</sup> or a suspension of oil supply from the Persian Gulf, which would endanger the public's right to pursue happiness might also be sufficient. Indeed, any action that might impede happiness, an incredibly broad category, would appear sufficient.<sup>54</sup>

In these cases, the Constitution would not limit the Cabinet's authority to enforce orders that are narrowly tailored to address the declared emergency. Their authority would not be limited to employing the least restrictive effect on its citizens' rights. There is no prohibition against the Prime Minister declaring new emergencies as old emergencies expire.<sup>55</sup> During a State of Emergency, the public would be required to carry out the instructions of the State.<sup>56</sup> While the LDP draft would require "respect" be given to fundamental human rights, "respect" is a state of mind, rather than a prohibition. Government can respect freedom of speech, but nonetheless prohibit it in circumstances where it deems appropriate. As such, the government can give respect by considering the effect of the emergency actions on citizens' rights, but nonetheless, conclude that the Cabinet's order and its limiting effect on the fundamental human rights is necessary. In

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<sup>53</sup> The United States was a major exporter of oil to Japan both before and after Japan's invasion of China in 1937. Having previously abrogated the Treaty of Commerce and Navigation (1911), in July 1940 United States passed the Export Control Act requiring licenses for shipments of critical war materials. Then the United States effectively embargoed the shipment of high octane aircraft fuel and other products important for Japan's war effort. In response, Japan was able to import low octane fuel and then raise the octane level to aviation quality. In July 1941, in response to Japan's occupation of southern French Indochina, the United States froze all Japanese assets in the United States and put in place a "hard embargo" against all oil shipments to Japan. KENNETH S. DAVIS, *FDR THE WAR PRESIDENT, 1940–1943* 262–265 (2000); *Oil – Oil and World Power*, ENCYCLOPEDIA OF THE NEW AMERICAN NATION, <http://www.americanforeignrelations.com/O-W/Oil-Oil-and-world-power.html>; 5 AM. J. OF INT'L L. No. 2 at 100–106; W.H.M., *Economic Warfare with Japan or a New Treaty?*, FOREIGN AFFAIRS (Jan. 1940), <http://www.foreignaffairs.com/articles/69975/whm/economic-warfare-with-japan-or-a-new-treaty>; U.S. Dep't of State, *Peace and War, United States Foreign Policy, 1931–1941*, United States Government Printing Office (1943), *Relations With Japan 1938–1940*, 97–98.

<sup>54</sup> Prime Minister Abe has suggested Japan could use mine sweepers as part of collective self defense if mines interrupted global oil supplies interfering with Japanese citizen pursuit of happiness. Collective defense right limited: Abe, JAPAN NEWS (July 14, 2014), <http://the-japan-news.com/news/article/0001423669>. Compare Koichi Kido defense argument at the War Crimes Trial in Edward J. Miller, *Bankrupting the Enemy* (2007) 242. Abe's comment echoing Japan's prewar actions reflects a theory of entitlement. See FORREST E. MORGAN, *COMPELLENCE AND STRATEGIC CULTURE OF IMPERIAL JAPAN*, 174 (2003).

<sup>55</sup> Young Lawyer's Association for The Future of Freedom, *supra* note 13; Voices of Overseas Youth for Civic Engagement, *supra* note 44.

<sup>56</sup> *Id.* Proposed Article 99.3; see also, Noah Smith, *Is Japan Asia's Next Autocracy?*, BLOOMBERG VIEW (Feb. 20, 2015), <http://www.bloombergview.com/articles/2015-02-20/japan-s-constitutional-change-is-move-toward-autocracy>.

short, rights must be respected by deliberating the effect of Cabinet action on the citizens' rights, but that respect does not prevent "violation" of rights if deems such infringements as "necessary" or "reasonable."<sup>57</sup>

To restrict abuse of the emergency clause under the Meiji Constitution, Ito Hirobumi when drafting the Meiji Constitution<sup>58</sup> cabined use of the emergency clause to situations where the Diet was not in session and subjected emergency actions taken to Diet review once the Diet returned into session.<sup>59</sup> Under a constitution which placed power in an Emperor descended from the Sun Goddess, which did not provide for representative democracy,<sup>60</sup> did not grant self-executing rights to the public, and made no provision for recalling the Diet into session to deal with an emergency, this may have made sense. It is hardly a satisfactory solution for a democracy under a constitution that separates and cabins government power.<sup>61</sup> Post-emergency review by the legislature (provided in the Meiji Constitution) hardly compensates for the loss of human rights and freedoms the LDP's contemplated amendment would make permissible during that emergency period. Actions taken under emergency cabinet orders would be constitutional, so neither the government nor government officials would be responsible for actions taken in derogation of people's rights. The 100-day period when an emergency declaration is in place before it requires extension by the Diet (or perhaps reordering by the Prime Minister) is a long period; much can happen to topple a democracy, destroy an opposition

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<sup>57</sup> *Abe Tells Upper House Committee 'Emergency Provision' Important in Constitutional Reform*, MAINICHI (Nov. 11, 2015), <http://mainichi.jp/english/articles/20151111/p2a/00m/0na/025000c>; *see also Conservative Group Behind Pro-Constitutional Amendment Petition Collecting*, MAINICHI (May, 4, 2016), <http://mainichi.jp/english/articles/20160504/p2a/00m/0na/011000c> (noting that the support group for emergency clause amendment believes the clause will enable the setting aside of fundamental human rights).

<sup>58</sup> For a discussion of Ito's views on the subject, *see* Colegrove, *supra* note 27, at 642, 657–659.

<sup>59</sup> ITO, *supra* note 7, at 16–19.

<sup>60</sup> KERBO MCKINSTRY, *WHO RULES JAPAN: THE INNER CIRCLES OF ECONOMIC AND POLITICAL POWER* 85 (1995). The only representative body under the Meiji Constitution was the elected Lower House of the Diet, but at the time of adoption only some one point five percent of Japan's forty million citizens had the right to vote. In the run up to the Constitution, the Peace Preservation Law of 1887, which was even more restrictive of freedoms than the Press and Newspaper Laws adopted prior to the constitution and which had been instrumental in defeating the Freedom and People's Rights Movement, was enacted. In 1925 a draconian iteration of the Peace Preservation Law was enacted as a counterweight to the Universal Male Suffrage Law of 1925, suppressing the rise of representative democracy.

<sup>61</sup> This is not to suggest that some expansion of executive powers could not take place during an emergency and/or that the judiciary might grant the executive greater authority to deal with the emergency. *See* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); Mark Tushnet, *Issues of Method in Analyzing the Policy Response to Emergencies*, 56 STAN. L. REV. 1581 (2004).



movement, or punish enemies during such a period. One of the main factors ending democracy in Rome was when the “Dictator,” acting under the emergency provisions of governance (which limited his term of office), remained in office. More recently, Hitler rode to power on the back of the Weimar Republic’s Emergency Clause.<sup>62</sup>

Democracies rarely introduce emergency provisions into democratic constitutions by way of amendment<sup>63</sup> and a majority of “emergency constitutions” require some actor in addition to a Head of State or Prime Minister to approve the declaration.<sup>64</sup> The contemplated amendment calls for Diet (or at least House of Representatives) concurrence either before or after a declaration, allowing a declaration to be called without prior Diet approval and without setting at least a short time period for Diet action to accept or reject the declaration. The amendment the LDP is considering fails to take into account the potential for legislative or executive abuse.<sup>65</sup> Giving the Diet authority to extend an emergency runs the risk that a political party might remain in power by simply extending so-called emergencies, thereby avoiding elections. This is especially true in the Japanese situation where the Diet, like the Cabinet, is likely under the control of the declaring Prime Minister’s party, so there likely is a congruence of interest between the declaring Prime Minister and the Diet. The judiciary is intentionally excluded from review of the declaration or actions taken under emergency Cabinet orders.

Of course, democracies are not immune from the impulse to take “emergency measures” that limit citizens’ rights in the face of an

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<sup>62</sup> Marc De Wilde, *Just Trust Us: A Short History of Emergency Powers and Constitutional Change*, 3 COMP. LEGAL HIST. 110 (2015). See JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 139–178 (1991). See GOODMAN, *supra* note 17, at 27–30, 49–52; GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION 33, 78–80 (1957); GEORGE AKITA, FOUNDATIONS OF CONSTITUTIONAL GOVERNMENT IN MODERN JAPAN, 1868–1900, at 165–166 (1967); Yoshiuki Noda, *Comparative Jurisprudence in Japan: Its Past and Present*, in THE JAPANESE LEGAL SYSTEM 194, 196 (Hideo Tanaka ed., 1976); Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law*, in LAW IN JAPAN 5, 34 (Arthur Taylor Von Mehren ed., 1963), would fail to recognize the possible shortcomings of Emergency Powers in its former ally’s constitution.

<sup>63</sup> As early as 1610 in *The Case of Proclamations* (1610) 77 Eng. Rep. 1352, Lord Coke held that the British King’s proclamation right did not extend to changing either common law or statute law. See generally Bjørnskov & Voigt, *supra* note 50 (citing only two examples of democratic countries who adopted emergency provisions by amendment in footnote 3).

<sup>64</sup> See generally Bjørnskov & Voigt, *supra* note 50 (stating that 58% require action by either one or more Houses of the Legislature).

<sup>65</sup> See generally Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631 (2006); De Wilde, *supra* note 62.



emergency.<sup>66</sup> Ironically, Japan's leaders, who roundly and correctly criticize the internment of Japanese Americans during the emergency of the Pacific War, appear poised to engrain emergency powers limiting rights and limiting separation of power. The Supreme Court of the United States, however, recognized its failure a mere decade later when it reined in the assertion of Presidential power to seize steel mills to forestall a labor shutdown in order to continue manufacture of steel needed for armaments to continue the Korean War.<sup>67</sup> In face of the so-called "war on terrorism," the Court has continued to assert its role to review actions of the executive.<sup>68</sup>

The need for such an emergency amendment is yet to be shown. The Self Defense Force is frequently used under the current Constitution to assist the civilian population when typhoons, tsunami, earthquakes and other disasters occur in Japan. Japan's government, operating under the 1947 Constitution issued much needed evacuation orders as well as instructions when the TEPCO nuclear power plant was disabled during the 2011 Great East Japan Earthquake and Tsunami and the Fukushima Nuclear accident. Prime Minister Kan, acting under the Constitution, went to Fukushima to take a hands-on approach to the nuclear disaster.<sup>69</sup>

If the emergency power amendment was adopted, the current generation of LDP leaders would (in disregard of both their parents' and grandparents' arguments that the Meiji Constitution had been abused by the military) provide a means to set aside the 1947 Constitution's democratizing

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<sup>66</sup> See generally Vermeule, *supra* note 65 (citing WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005); Christina E. Wells & Jennifer K. Robbennolt, *Foreword to Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis*, 69 MO. L. REV. 897 (2004); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003)).

<sup>67</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>68</sup> See STEPHEN BREYER, *THE COURT AND THE WORLD* 65–88 (2015). It was not until 2011 that the Executive Branch acknowledged that documents such as the *Ringle Report on Japanese Internment*, NAVAL HISTORY AND HERITAGE COMMAND (Dec. 30, 1941), <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/ringle-report-on-japanese-internment.html>, had not been made available to the Supreme Court when it was deciding the internment cases. David G. Savage, *U.S. Official Cites Misconduct in Japanese American Internment Cases*, L.A. TIMES (May 24, 2011), <http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525>.

<sup>69</sup> See, e.g., RICHARD J. SAMUELS, 3.11: DISASTER AND CHANGE IN JAPAN 9–16 (2013). Yet he was criticized for such action – not on constitutional grounds but on grounds that he was “an amateur” and should leave handling of the disaster to the professional bureaucrats. Yuka Hayashi & Norihiko Shirouzu, *Kan Cuts Out Bureaucrats*, WALL ST. J. (Apr. 9, 2011), <http://www.wsj.com/articles/SB10001424052748704587004576244321680679708>.

provisions such as elections, separation of powers, judicial review and citizens' rights, thereby creating a constitutional path enabling a potential future generation of leaders with an autocratic bent to set aside the democratic ideals and the rights provisions of the Constitution. For example, the emergency Article of the Meiji Constitution was abused in 1928 when an emergency declaration was a subterfuge for the government's inability to obtain Diet approval of an amendment to the Peace Preservation Laws that increased the penalties for "dangerous thoughts".<sup>70</sup> If adopted, a Prime Minister's declared emergency might, for example, be used to criminalize speech opposing policies of the Prime Minister's government or speech urging the Prime Minister to step down and allow for a new Lower House election.

While closely cabined emergency executive powers to preserve democracy may make sense for countries with a historically strong rule of law/rights-based systems with democracy-protecting structures, Japan does not fall into such category. Its overly deferential judiciary (which lacks support from the Diet and Cabinet)<sup>71</sup> is a weak reed on which to rely.<sup>72</sup> Japan's executive has become the supreme organ of the State, notwithstanding the Constitution.<sup>73</sup> Its bureaucracy acts in extra-legal fashion with little judicial review and shows disdain for the rule of law; in the debate over "reinterpreting" Article 9 the powerful Cabinet Legislation Bureau (the bureaucratic organ designed to protect the Constitution from executive and legislative action inconsistent with the Constitution) took a

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<sup>70</sup> See COLEGROVE, *supra* note 27, at 658–659 to the effect that the events of 1928 disclosed that prewar Japan was not a democracy.

<sup>71</sup> The Court has only found a handful of laws unconstitutional and except for their voting rights decisions, none upholding a democratic state against Executive and Diet challenge. Even in voting rights the Court is yet to set aside a single election for a single Diet seat. Prime Minister Abe is reported to have considered rejecting a proposal for redistricting that would comply with the Court's decisions and instead would put the proposal into effect only after 2020 – thereby excluding elections in which the LDP hopes to achieve their two-thirds majority in the Upper House enabling it to propose Constitutional amendment. See *Abe may OK electoral system reform to reduce vote-value disparity after 2020 Census*, MAINICHI (Feb. 27, 2016), <http://mainichi.jp/english/articles/20160227/p2a/00m/0na/013000c>.

<sup>72</sup> The 2014 Lower House election that gave the LDP its two-thirds majority in that House was held under a condition of inequality – but no judicial relief was granted. See *Top Court Questions Constitutionality of 2014 Election*, MAINICHI (Nov. 26, 2015), <http://mainichi.jp/english/english/newsselect/news/20151125p2g00m0dm056000c.html>.

<sup>73</sup> Virtually all laws adopted by the Diet are Cabinet offered Bills written by the Executive Branch. Gerald L. Curtis, *The Government of Modern Japan: The Japanese Diet (Parliament)*, ASIAN TOPICS, [http://afe.easia.columbia.edu/at/jp\\_diet/govtjd03.html](http://afe.easia.columbia.edu/at/jp_diet/govtjd03.html). The Judiciary itself acts to defeat separation of powers doctrine by appointing Judges to serve in Executive Agencies. Kazuko Tanaka, *Country Paper for Japan, Organization and Management of Government Legal Services of Japan*, ASIAN DEV. BANK, <http://www.adb.org/sites/default/files/project-document/71939/33069/ledge/far.pdf>.

“no position” position.<sup>74</sup> Emergency powers in the Japanese situation are both unnecessary and dangerous.<sup>75</sup>

- B. *Amending the Preamble, Enhancing the Position of the Emperor, Making the Family the Basic Unit of Society – Steps on the Road to Pre-War Kokutai*
- i. *The contemplated Amendment to the Preamble and “Japanese Uniqueness”*

The LDP's considered amendments for a new Preamble to the Constitution would emphasize Japan's “uniqueness,”<sup>76</sup> a concept tied to the notion of *Kokutai* and the descent of the gods in Japan,<sup>77</sup> and whose uniqueness is itself “special.” In Japanese myth, the gods descended on the islands of Japan, where Jimmu, a direct descendant of the Sun Goddess Amaterasu, moved from god to human as the first in an unbroken imperial line leading to the current Emperor.<sup>78</sup> Under State Shinto, the Emperor was a living Kami; under the Japanese family system, he was the head of the Japanese house consisting of all Japanese people who, through their descent

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<sup>74</sup> See, e.g., *Cabinet Legislation Bureau has No Record of Constitution Reinterpretation Deliberations*, MAINICHI (Sep. 28, 2015), <http://mainichi.jp/english/english/newsselect/news/20150928p2a00m0na035000c.html>; *Cabinet Legislation Bureau Head Left No Record of Meeting About Constitutional Reinterpretation*, MAINICHI (Feb. 15, 2016), <http://mainichi.jp/english/articles/20160215/p2a/00m/0na/007000c>.

<sup>75</sup> See Mark Fenwick, *Emergency Powers and the Limits of Constitutionalism in Japan*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 314, 314–341 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010). For lack of necessity see, e.g., *Most Municipalities Hit by 2011 Disasters See No Need for Emergency Clause in Constitution*, MAINICHI (Apr. 30, 2016), <http://mainichi.jp/english/articles/20160430/p2a/00m/0na/003000c>.

<sup>76</sup> Young Lawyer's Association for the Future of Freedom, *supra* note 13; Voices of Overseas Youth for Civic Engagement, *supra* note 44; see generally CHRISTIAN G. WINKLER, *THE QUEST FOR JAPAN'S NEW CONSTITUTION: AN ANALYSIS OF VISIONS AND CONSTITUTIONAL REFORM PROPOSALS 1980–2009* (2011). See also REPETA, *supra* note 44.

<sup>77</sup> NOZOMU KAWAMURA, *SOCIOLOGY AND SOCIETY OF JAPAN* 154 (Routledge 2011); HANE & PEREZ, *supra* note 3, at 24–25.

<sup>78</sup> MOTOORI NORINAGA, *The True Tradition of the Sun Goddess*, 2 SOURCES OF JAPANESE TRADITION 15–22 (Ryusaku Tsunoda et al. eds., 1964); ROBERT J. SMITH, *ANCESTOR WORSHIP IN CONTEMPORARY JAPAN* 8–11 (1974); HANE & PEREZ, *supra* note 3, at 24–25; JOHN S. BROWNLEE, *JAPANESE HISTORIANS AND THE NATIONAL MYTHS, 1600–1945: THE AGE OF THE GODS AND EMPEROR JIMMU* 4–7 (1997). A modern illustration of the dangers of an Emergency Clause, even in the face of an attempted Military Coup, is seen by the over reaction to the attempted coup in Turkey during the summer of 2016. See Ozan Varol, *Turkey's Reichstag Fire*, WORLD POST, (July 22, 2016), [http://www.huffingtonpost.com/entry/turkeys-reichstag-fire\\_us\\_5791f215e4b0a1917a6e71e3](http://www.huffingtonpost.com/entry/turkeys-reichstag-fire_us_5791f215e4b0a1917a6e71e3).

from lesser Kami had a mythical relationship to each other<sup>79</sup> and to the Emperor, who was entitled to unquestioned obedience.<sup>80</sup> Under pre-war *Kokutai*, Japan was one national family under the Emperor.<sup>81</sup>

Differences between societies make each unique in the sense that they are different from each other. Japan's pre-war era uniqueness was of a special character;<sup>82</sup> a code word whose meaning was superiority of the "Yamato race."<sup>83</sup> Ideas of Japanese superiority can be traced to early Japan

<sup>79</sup> The various clans making up the Japanese people were also considered descendants of Kami and related to the Sun Goddess (who was the Kami ancestor of the Imperial family). See Hugh H. Smythe, *The Japanese Emperor System*, 19 SOCIAL RESEARCH 485, 492 (1952). See BRIJ TANKHA, KITA IKKI AND THE MAKING OF MODERN JAPAN 17, 28 (Global Oriental 2006) (the tying of the prevailing prewar idea of Japanese uniqueness and *kokutai* to the "sacred" origin or "divinity" of Japan.)

<sup>80</sup> See, e.g., statement by Emperor Hirohito upon enthronement quoted in QUIGLEY, *supra* note 7, at 74–75.

<sup>81</sup> SMITH, *supra* note 78, at 25–26; HAROLD J. WRAY, *Changes and Continuity in Japanese Images of the Kokutai and Attitudes and Roles Toward the Outside World, A Content Analysis of Japanese Textbooks 1903-1945*, at 18–19, 316, 408, 411 (1971); Cecil Brett, *The Priest-Emperor Concept in Japanese Political Thought*, 23 INDIAN J. OF POL. SCIENCE 17, 25–26 (1962); Mariko Asano Tamanoi, *Japanese Nationalism and the Female Body: A Critical Reassessment of the Discourse of Social Reformers on Factory Women*, in WOMEN AND CLASS IN JAPANESE HISTORY 275, 280 (Hitomi Tonomura et al. eds., 1999).

<sup>82</sup> The Occupation's Shinto Directive attacked this idea of uniqueness by forbidding the teaching of Japan's alleged imperial, national or territorial superiority based on ancestry or divine descent. SUPREME COMMANDER FOR THE ALLIED POWERS, *The Shinto Directive*, (15 December 1945); see also JOSEPH M. KITAGAWA, RELIGION IN JAPANESE HISTORY 271 (1966).

<sup>83</sup> Race fueled the Pacific War. American discrimination against Asians had its origin in the Immigration Act of 1790 which limited nationalization to "white" people, see *Ozawa v. United States*, 260 U.S. 178 (1922) and *United States v. Thind*, 261 U.S. 204 (1923), and culminated in the Japanese exclusion from the Pacific Coast and internment during the war. In 1889, the Supreme Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), upheld the Chinese Exclusion Act of 1882, laying the foundation for later rulings that upheld Alien Land Laws that effectively prohibited Japanese from acquiring land in Pacific Coast states. See *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923). The California Alien Land law was only held unconstitutional after the War had ended. See *Oyama v. California*, 332 U.S. 633 (1948). For American prewar discrimination against Asians, see generally COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 27–46, 317–322 (1982); Office of the Historian, *Japanese-American Relations at the Turn of the Century, 1900-1922*, DEP'T OF STATE, <http://history.state.gov/milestones/1899-1913/japanese-relations>. The exclusion of Japanese American's from the West Coast and their imprisonment after Pearl Harbor, notwithstanding evidence that the West Coast Japanese were loyal to the United States, was a culminating act of such discrimination. See CURTIS B. MUNSON, JAPANESE ON THE WEST COAST (1941); *History of the FBI World War II Period: Late 1930's-1945*, FBI HISTORY, <https://www2.fbi.gov/libref/historic/history/worldwar.htm>; Ringle Report on Japanese Internment, *supra* note 70; RICHARD REEVES, INFAMY 38–40, 48–50, 53–54 (2015); Eric J. Sundquist, *The Japanese American Internment: A Reappraisal*, 57 AM. SCHOLAR 529, 541 (1988); DAVIS, *supra* note 55, at 418–429; GREG ROBINSON, BY ORDER OF THE PRESIDENT 65–71 (2001). The opposition of the United States to Japan's request for an Asian Equality Covenant in the Versailles Treaty fueled Japanese/American antagonism. WORLD WAR I ENCYCLOPEDIA 962, 1597–1598 (Spencer C. Tucker ed., 2005); PEARL HARBOR REEXAMINED: PROLOGUE TO THE PACIFIC WAR 7 (Hilary Conroy & Harry Wray eds., 1990); Shusuke Takahara, *Wilsonian Idealism and Its Impact on Japan*, ASIATIC SOC'Y OF JAPAN (Mar. 17, 2003), <http://www.asjapan.org/web.php/lectures/2003/03>. American racism produced a

and especially the Tokugawa period.<sup>84</sup> All of which raises the question whether “unique” in the LDP contemplated amendment has a similar racial/superior component.<sup>85</sup> Uniqueness of Japan, its people, and its culture was a central feature of pre-war *Kokutai* under which sovereignty was in the Emperor who, as a descendant of the Sun Goddess,<sup>86</sup> was both the Head of State Shinto and Head of State, with authority and power inherent to all heads of State.<sup>87</sup>

One of the “unique” aspects of *Kokutai* was a rejection of individuality and reliance on Japan's group-oriented society whose basic unit was not the individual, but the family group, the *ie*,<sup>88</sup> itself a bulwark

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racial backlash in a Japan that considered itself a superior culture and society, making accommodation to American demands impossible. See generally JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986).

<sup>84</sup> ELLWOOD & PILGRIM, *supra* note 28, at 44–46.

<sup>85</sup> PETER N. DALE, *THE MYTH OF JAPANESE UNIQUENESS* 32–35, 39–40, 204–205 (1986); JOHN W. DOWER, *WAYS OF FORGETTING, WAYS OF REMEMBERING* 31–32, 203–318 (2012); WRAY, *supra* note 81, at 18–19, 408–411.

<sup>86</sup> The Mythology of the Emperor system is linked to the Japanese creation myth and the Land of the Gods. The myth is consistent with the universal “hero myth.” For a discussion of the Japanese myth and the universal hero myth. See generally JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 207–216 (1949); see also W. PETRIE WATSON, *THE FUTURE OF JAPAN* 13–14 (1907). The Emperor as a living God can be traced to Hirohito's mythological relationship to Jimmu and Amaterasu. This mythical ancestry supported the rulers of the early Yamato Kingdom. FLOYD HIATT ROSS, *SHINTO, THE WAY OF JAPAN* 25–30 (1965); MICHIKO Y. AOKI, *ANCIENT MYTHS AND EARLY HISTORY OF JAPAN* (1974).

<sup>87</sup> Prior to adoption of the Meiji Constitution, the Emperor under his inherent authority declared the Restoration complete giving himself governing authority. Two months later the Emperor issued the Charter Oath made by the authority of his office, an office that had no definition except for the Restoration Edict he had issued 2 months earlier. Smythe, *supra* note 79, at 485, 488. During the early Meiji period the Home Ministry used its inherent authority, stemming from its duty to protect the public interest and public order, to censor and close down press organs it objected to. KASZA, *supra* note 29. Article 4 of the 1947 Constitution (“The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.”) would also be amended by dropping the word “only” opening the door to the Emperor performing acts of state that are not provided for by the Constitution – potentially unhinging his inherent authority from constitutional restraint. Voices of Overseas Youth for Civic Engagement, *supra* note 44.

<sup>88</sup> For a discussion of the historic roots and the basics of the *Iye* clan system from the Yamato Kingdom era until the post war period and the relationship of the family system to the Emperor as a Kami God, see Smythe, *supra* note 79, at 485, 488–491. *Iye* was a clan based family with a Head of House to whom all House members owed loyalty. It continued in a never ending stream through time. The House (family) was the basic unit of Japan from the 8<sup>th</sup> Century. Although abolished in law by the Occupation and the Constitution of 1947, remnants of the *Iye* and the idea of the *Iye* remain in Japan through the Family Register system. For a discussion of the *Iye*, see CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* (3d ed. 2012).

of the *Kokutai*.<sup>89</sup> The communal nature of Japanese society as one family under the Emperor was central to *Kokutai*.<sup>90</sup>

The contemplated Preamble's emphasis on uniqueness is related to the amendment that would make the Emperor the Head of State and other seemingly unrelated amendments such as the amendment to strike individuality from the Constitution and the amendment to make the family the basic unit of society. Rejection of individuality (a trait which is seen as an unwelcome Western import) and reliance on the family group were unique aspects of *Kokutai*.<sup>91</sup> Under *Kokutai*, Japanese sovereignty resided in the Emperor, not in the people.<sup>92</sup> The Constitution's rejection of the pre-war *Kokutai* is reflected in the Preamble that states, "sovereign power resides with the people."<sup>93</sup> In addition to stressing Japan's "uniqueness," the new Preamble would delete this phrase and simply refer to "popular sovereignty."

History enables us to gain a better understanding of what the amendment would mean. In the period of so-called Taisho Democracy, Japan refused to accede to the Kellogg Briand Pact (under which acceding nations renounced war) *on behalf of the Japanese people*, because to do so would denigrate the Emperor.<sup>94</sup> Japan also sought to add as a condition to the unconditional surrender demanded by the Allies, that the prerogatives of the Emperor were not to be affected by surrender.<sup>95</sup> The Allies declined but noted that the ultimate "form" of government was to be determined by the Japanese people. To some in Japan's government, this provided breathing room for *Kokutai* arguing that "form" of government dealt with

<sup>89</sup> HAROLD S. QUIGLEY & JOHN E. TURNER, *THE NEW JAPAN: GOVERNMENT AND POLICIES* 140 (1956).

<sup>90</sup> See SMITH, *supra* note 78, at 25–26; WRAY, *supra* note 81, at 408 (the Education Department's "Principles of *Kokutai*" stressed the unbroken line of Imperial descent from the Sun Goddess and the family nation following the Emperor's will). See also DELMAR M. BROWN, *NATIONALISM IN JAPAN* 208 (1955) (quoting the Principles of *Kokutai*).

<sup>91</sup> See ROSS, *supra* note 86, at 144–150 (defining the relationship of rejection of individuality with *Kokutai* and its relationship to the Pacific War); see also WRAY, *supra* note 81, at 408–410; see also BROWN, *supra* note 90, at 105, 208–209, 222–225 (individuality was also rejected because it was inconsistent with an all-powerful State).

<sup>92</sup> The Emperor's Charter Oath and speech on promulgation of the Meiji Constitution utilize the Emperor's mythical lineage from Jimmu (and hence from the Sun Goddess) as the basis for Imperial sovereignty by noting that the Emperor's right to sovereignty was inherited from his Imperial ancestors. See Colegrove, *supra* note 27, at 646 (quoting Professor Hozumi to the effect that Hirobumi Itō was trying to harmonize a government based on the Emperor's lineage from the Gods with 19th Century constitutionalism).

<sup>93</sup> KENPŌ pmb.

<sup>94</sup> QUIGLEY, *supra* note 7, at 70–72.

<sup>95</sup> Smythe, *supra* note 79.



administration and could be decided by the people while *Kokutai* was of a different nature and remained unaffected.<sup>96</sup> The issue surfaced again when Japanese negotiators and translators responded to the Occupation's draft Constitution by attempting to change the basis of the imperial position from "sovereign will of the people" to "supreme will",<sup>97</sup> all seeking to protect the *Kokutai* nature of the Emperor as the vessel of Japanese sovereignty.

The Preamble under contemplation would reject the Constitution's recognition of sovereignty of the people as the source of legitimate government and thus reject the ideal that government is responsible to the people. Together with the amendments to make the family the basic unit of Japanese society, to remove individuality from the Constitution, and to make the Emperor the Head of State, the LDP could be well on the way to recreating the pre-war *Kokutai*.

ii. *Enhancing the position of the Emperor*

Under *Kokutai*, the Emperor was the head of the Japanese house<sup>98</sup> owed the respect and obedience from his subjects (members of the house) that the family head of house was owed by all family members.<sup>99</sup> Schools taught State Shinto. The Emperor's Rescript on Education was seen as virtually sacred with its "morals" and "ethics" more powerful than religious writ.<sup>100</sup> Reverence to the Emperor, the cult of Emperor worship and family fealty owed to the Emperor as the head of house was learned at an early age.<sup>101</sup> *Kimigayo* (idealizing the Emperor's reign and rule) became the national anthem in 1888.<sup>102</sup> The State became an extension of the Emperor through the concept of *Kokutai*, which tied the Japanese people to the State

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<sup>96</sup> HELLEGERS, *supra* note 38.

<sup>97</sup> KOSEKI SHOOICHI, *supra* note 37, at 112–113, 117.

<sup>98</sup> Cf. QUIGLEY, *supra* note 7, at 74.

<sup>99</sup> See Smythe, *supra* note 79, at 488 (analogizing the Emperor-subject relationship to that of a parent and child); BURUMA, *supra* note 17, at 55–57; see also Miyazaki Fumiko, *The Formation of Emperor Worship in the New Religions: The Case of Fujidō*, 17 JAPANESE J. RELIGIOUS STUDS. 281, 309 (1990); WRAY, *supra* note 81, at 4–5, 18–19.

<sup>100</sup> W.G. BEASLEY, JAPANESE IMPERIALISM, 1894–1945 35 (1987); HANE & PEREZ, *supra* note 3, at 136.

<sup>101</sup> See SMITH, *supra* note 78, at 26–27; see also Smythe, *supra* note 79, at 487 n.6 (the Ministry of Education's official explanation of *Kokutai* (The Fundamental Principles of the National Structure) was taught in public schools).

<sup>102</sup> See LARGE, *supra* note 18, at 29–30; Peter Cave, *The Inescapability of Politics? Nationalism, Democratization and Social Order*, in EDUCATION AS A POLITICAL TOOL IN ASIA 52 n.14 (Marie Lall & Edward Vickers eds., 2009).



and their very special relationship to the Emperor, to each other, to Amaterasu, and the gods.<sup>103</sup>

The 1947 Constitution does not give the Emperor any governmental position—he is simply the Emperor. He was intentionally not given the Head of State title<sup>104</sup> and was to be a symbol without power,<sup>105</sup> which is underscored by the current Article 3 that limits the Emperor to performing acts of state that have been subjected to the advice of and approval by the Cabinet.<sup>106</sup> The LDP contemplates removal of the current Article 3 and unhinging imperial acts from Cabinet superiority (approval). The 1947 Constitution gives the Emperor specific functions to perform, all are ceremonial, carrying out government decisions in which the Emperor has played no role. The LDP would make the Emperor the Head of State without providing what authority the Head of State would possess except for the fact that imperial acts need not be limited by advice and concurrence of the Cabinet.<sup>107</sup>

The position of Head of State implicates the historic, cultural, and *Kokutai* role of the Emperor, especially as the change to the Preamble would bring to the fore the “uniqueness” of Japan that was central to *Kokutai* and the Emperor’s ancestry. In its initial response indicating willingness to accept the Potsdam Declaration, Japan added one condition, retention of the Emperor’s prerogatives.<sup>108</sup> This might have meant the retention of the

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<sup>103</sup> See LARGE, *supra* note 18, at 30 (*Kokutai* which unites Japan and its people—the land and the descendants of the Gods—with the Emperor in whom sovereignty lies, is inconsistent with democracy in which the State’s power is limited by the rights of the people, who hold sovereignty); see also BROWN, *supra* note 90, at 208–209. The Occupation attacked *Kokutai* by insisting that the Constitution recognize the people’s sovereignty, by rejecting the Imperial Rescript on Education and issuing a directive on “Abolition of Governmental Sponsorship, Support, Perpetuation, Control, and Dissemination of State Shinto” that removed government from participation in and/or support of Shinto affairs. See STUART D.B. PICKEN, SOURCEBOOK IN SHINTO: SELECTED DOCUMENTS 113–117 (2004). Japanese Ministry of Education officials fought back, supporting the Rescript as ethical and moral teaching. See TSUNODA ET AL., *supra* note 29, at 277–288; see also ROSS, *supra* note 86, at 147–150. A new Fundamental Law on Education was adopted in 1945 and in 1948 the Rescript was withdrawn from public schools. WILLIAM P. WOODARD, THE ALLIED OCCUPATION OF JAPAN 1945–1952 AND JAPANESE RELIGIONS 164–168 (1972).

<sup>104</sup> KENPŌ, art. 4. See also Kades, *supra* note 33, at 223; JOHN W. DOWER, EMBRACING DEFEAT 367–369 (1999) (General MacArthur recognized the Emperor as being at the head of the State but would not give the Emperor such title).

<sup>105</sup> NAKAMURA MASANORI, THE JAPANESE MONARCHY: AMBASSADOR GREW AND THE MAKING OF THE ‘SYMBOL’ EMPEROR SYSTEM 90–97 (Herbert P. Bix et. al trans., M.E. Sharpe Inc. 1992) (1989).

<sup>106</sup> KENPŌ, art 3.

<sup>107</sup> Jones, *supra* note 44.

<sup>108</sup> QUIGLEY & TURNER, *supra* note 89, at 5.

Emperor as Head of State, and his *Kokutai* character, the contemplated amendment may be a means of returning to the initial Japanese response. The amendment would enable conservatives to argue that because the Emperor is Head of State as he was in Meiji Japan, together with the “uniqueness” of Japan that was the essence of the *Kokutai* (this uniqueness would now be recognized in the amended Preamble), and the dropping of Preamble language placing sovereignty in the people of Japan, the Emperor has the *Kokutai* status he held in the pre-war era. This argument would be strengthened by the considered amendment to Article 99 that would exempt the Emperor (Head of State) from the obligation to support the Constitution.<sup>109</sup>

The position of Head of State implies governmental powers typically exercised by a Head of State and implies the authority to create subordinate organs to assist the Head of State. The Emperor's current ability to perform *specific* duties derives not from his title but from the fact that the Constitution gives the Emperor the authority to perform *specific and limited* ceremonial duties. He appoints the Chief Justice of the Supreme Court because the Constitution says he shall do so, not because he is Head of State. The reason for such appointment authority is to elevate the position of the Chief Justice and highlight the rule of law, not to enhance the Emperor.

Granting the Emperor the Head of State mantle would give him a government position allowing government ministers to seek his view on matters, as well as give him the authority that inheres in the position of Head of State, an authority that is subject to interpretation. In some countries where there is both a Prime Minister and a Head of State, the Head of State may have broad powers, including the ability to determine when a new election must be held after a government is discharged.<sup>110</sup> To those who would argue that the Constitution would still restrain the Emperor's powers, one need look no further than the dual character of the Emperor under the

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<sup>109</sup> The amendment to recognize and require respect for the flag and national anthem, symbols of the State like the Emperor, could affect the authority of an Emperor Head of State and might require the public to respect the Emperor. See Jones, *supra* note 44; *Japan's Constitution: Back to the Future*, THE ECONOMIST (June 1, 2013), <http://www.economist.com/news/asia/21578712-shinzo-abes-plan-rewrite-japans-constitution-running-trouble-back-future>.

<sup>110</sup> See GRUNDGESETZ [GG] [BASIC LAW], arts. 54–61 (Ger.); see also Christopher Sweeney, *Australia in turmoil as Whitlam is fired*, THE GUARDIAN (Nov. 12, 1975), <http://www.theguardian.com/world/1975/nov/12/australia.fromthearchive> (Australian Government Crisis - the Governor-General, as representative of the Queen (Head of State), dismissed the government and ordered a new election); NATIONAL ARCHIVES OF AUSTRALIA, THE DISMISSAL, 1975 – FACT SHEET 240 (2016), <http://www.naa.gov.au/collection/fact-sheets/fs240.aspx>.

Meiji Constitution,<sup>111</sup> it could be argued that a dual character would exist, under which his powers as Emperor would be limited by Chapter I while his powers as Head of State would not be so limited.<sup>112</sup> Head of State, Emperor Hirohito, may not have exercised power, but he had great authority; without his agreement the war could not have been prosecuted. When he told a divided Cabinet to accept the Potsdam Declaration, he ended the war.<sup>113</sup> As is true generally, but more so in regard to Japanese law, it is the law as interpreted rather than the written law that is controlling.<sup>114</sup>

The change would be substantive: it would provide a juridical hook on which to hang a “Cabinet Declaration” overturning 70 years of interpretation of Chapter I of the Constitution<sup>115</sup> or allow the Cabinet Legislation Bureau to take “no position” on the interpretation issue *ala* its actions involving the Cabinet Declaration concerning Article 9.<sup>116</sup> Once given a government position not cabined by the Constitution, the perennial LDP majority could provide the Emperor significant powers by legislation giving such powers to the Head of State. In short, the amendment could lead to replacement of the symbolic Emperor with a *Kokutai* status Emperor.

The Constitution would make this replacement relatively easy because the Constitution does not use the English language title Emperor, but rather uses the Japanese term “Tenno,” which has a “heavenly” characteristic.<sup>117</sup> A

<sup>111</sup> See Colegrove, *supra* note 27, at 646–53 (dual character is not only related to the imperial sovereignty vs. constitutional monarch, but also the Emperor’s religious character via his ancestry descending from the Sun Goddess and his role under the Constitution).

<sup>112</sup> The LDP website describing the changes to the Emperor provisions states, “This chapter prescribes the Emperor as the Head of State, the symbol of the State and as a unifying entity for the people” giving the Emperor a triple character, Head of State, symbol of State, and unifying entity. See *LDP announces a new draft Constitution for Japan*, LIBERAL DEMOCRATIC PARTY OF JAPAN (May 7, 2012), <https://www.jimin.jp/english/news/117099.html>.

<sup>113</sup> KYOKO INOUE, *supra* note 8, at 164–182.

<sup>114</sup> See Yoichi Higuchi, *The Constitution and the Emperor System: Is Revisionism Alive?*, 53 L. & CONTEMP. PROBS. 51, 52 (1990) (viewing the 1947 Constitution as changing the Emperor from a sovereign Emperor to a symbolic Emperor); *id.* at 56–57 (noting that in practice the government has taken steps to showcase him as Head of State as part of a drive to reinstitute *Kokutai* in practice if not in law). See also GOODMAN, *supra* note 88 (for the view that in Japanese law, “What You See May Not Be What You Get”).

<sup>115</sup> See Part 2 subsection v.; see also *infra* note 244, Jeff Kingston, Opinion, *Abe’s constitutional putsch and U.S. security cooperation*, JAPAN TIMES (July 12, 2014), <http://www.japantimes.co.jp/opinion/2014/07/12/commentary/abes-constitutional-putsch-u-s-security-cooperation/#.U-FqiSx0wdU>.

<sup>116</sup> See *Legislation bureau head admits not recording constitutional reinterpretation discussions*, MAINICHI (Jan. 22, 2016), <http://mainichi.jp/english/articles/20160122/p2a/00m/0na/019000c>; *Cabinet Legislation Bureau’s job undermined by gov’t intervention*, MAINICHI (Sep. 28, 2015), <http://mainichi.jp/english/articles/20150928/p2a/00m/0na/028000c>.

<sup>117</sup> See “Tenno” COLLINS ENGLISH DICTIONARY, (2012), <http://dictionary.reference.com/browse/tenno>; Wikipedia,

“heavenly Emperor” Head of State uniquely descended from the Sun Goddess and Jimmu would represent something akin to Emperors under the Meiji Constitution.<sup>118</sup> The contemplated amendment to Article 20 that would remove the prohibition of any religious organization exercising political authority while permitting the State or organs of the State (for example an Emperor Head of State) to engage in religious activities that are traditional or considered matters of social etiquette<sup>119</sup> would enhance the status of and powers of a Tenno “heavenly Emperor” Head of State performing services that are the interface between the Emperor descended from the gods and the gods themselves, and would support a return to the pre-war *Kokutai*.<sup>120</sup>

While Emperor Hirohito in his “humanity declaration” rejected the idea that he was a god, he did not reject his lineage tracing back to the Sun Goddess, nor his inheritance of sovereignty over the land and people of Japan from his imperial ancestors ranging back to the Sun Goddess, the foundations of his pre-war *Kokutai* status.<sup>121</sup> In Shinto there is no single god in the monotheistic sense of the word, although god-like characters such as the Sun Goddess are part of Shinto. Shinto Kami, while they partake of deification, are not God in the Old or New Testament or Koran exclusive-God sense.<sup>122</sup> Kami are both gods who rule the earth, sky, and underworld, but are also spirits that can adhere in everything in the natural world, in

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[https://simple.wikipedia.org/wiki/Emperor\\_of\\_Japan](https://simple.wikipedia.org/wiki/Emperor_of_Japan); Jeff Taliaferro, *The Emperor of Japan*, HERALDICA (Jan. 7, 2001), <http://www.heraldica.org/topics/royalty/japan.htm>.

<sup>118</sup> See Brett, *supra* note 81.

<sup>119</sup> See Jones, *supra* note 44. Article 89 would also be amended to permit the use of public funds to support religious associations and institutions where the use is limited to customary matters or matters of social etiquette. Social etiquette is subject to broad interpretation and could include allowing government entities to make contributions to selected shrines (such as the Yasukuni Shrine) to celebrate holidays, celebrate festivals, honoring Japanese war dead, etc. The considered amendment does not require that all Shinto shrines be treated equally, potentially overturning the Supreme Court of Japan decision holding that a contribution to a specific shrine to honor the war dead was in violation of the Constitution because it constituted governmental favor of a specific shrine. See Saikō Saibansho [Sup. Ct.] Apr. 2, 1997 (gyo tsu) no. 156, 51 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan). The amendment would also appear to legitimize in the basic law the Court's decisions that enshrinement of Koreans who fought for Japan during the war is acceptable even in the face of family objection. Instead of relying on the non-governmental nature of Yasukuni the Court could rely on the “custom” of enshrinement of the war dead, or enshrinement as social etiquette. The prohibition of government officials visiting Yasukuni in their official capacity would be fully wiped off the books and with it the need for politicians to divide their personal from official self. See QUIGLEY & TURNER, *supra* note 89, at 190.

<sup>120</sup> BEN-AMI SHILLONY, ENIGMA OF THE EMPERORS: SACRED SUBSERVIENCE IN JAPANESE HISTORY 203–216 (2005).

<sup>121</sup> TANKHA, *supra* note 79, at 38–43.

<sup>122</sup> See ROSS, *supra* note 86, at 31–33.

ancestors, in people, in beautiful scenery.<sup>123</sup> The Sun Goddess is the principle heavenly Kami of the Japanese myth and ancestor to, but only to, the imperial family.<sup>124</sup> While not a God in the “monotheistic” sense, Hirohito’s supposed ancestry going back to the Sun Goddess gave him a different status from other beings and in this sense reflected his divinity.<sup>125</sup> Although some Japanese people thought of him as a god in the “one God” traditions, others rejected that view.<sup>126</sup> It was only his supposed status as a “one God”-type god that Hirohito renounced.<sup>127</sup>

The Emperor did not acknowledge that the idea of a living Emperor god was a relatively new phenomenon which the Meiji revolutionaries adopted, building on theocratic ideas of the late Tokugawa period to strengthen their hold on power,<sup>128</sup> or that the myth of descent from the Sun Goddess was created to support the ancient Yamato rulers' hold on power.<sup>129</sup> Refusal to renounce his descent from the Sun Goddess was not accidental nor was his failure to acknowledge that such descent was a myth, creating ambiguity allowing some conservatives, nationalists and revisionists to worship his descendant to this day.<sup>130</sup> Nor did the Emperor renounce the idea that the Japanese people themselves were progeny of the Kami, an idea inherent in State Shinto’s placement of the Emperor as head of the Japanese family, carried forward by the Rescript on Education and the curriculum in Meiji Constitution-era schools,<sup>131</sup> and at the heart of the idea that the Japanese are descendants of the gods<sup>132</sup> whose imperial line reached back into prehistory making them unique and superior.<sup>133</sup>

Shinto and the Emperor’s unbroken lineage back to the Sun Goddess continue to play a role in modern Japan, including a role in the ascension of

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<sup>123</sup> See, e.g., KITAGAWA, *supra* note 82, at 11–19; CHARLES J. DUNN, EVERYDAY LIFE IN TRADITIONAL JAPAN 124–126 (1969); MORGAN, *supra* note 54, at 38–39, 41; CAMPBELL, *supra* note 86, at 212; *Kami*, BBC (Sept. 04, 2009), [http://www.bbc.co.uk/religion/religions/shinto/beliefs/kami\\_1.shtml](http://www.bbc.co.uk/religion/religions/shinto/beliefs/kami_1.shtml).

<sup>124</sup> SMITH, *supra* note 78, at 10–11.

<sup>125</sup> Smythe, *supra* note 79, at 488–491.

<sup>126</sup> See Colegrove, *supra* note 27, at 642, 645–648; 2 SOURCES OF JAPANESE TRADITION: 1600 TO 200, PART 2: 1868 TO 2000, at 122–125 (Wm. Theodore de Bary et al. eds., 2d ed. 2006).

<sup>127</sup> See, e.g., Brett, *supra* note 81, at 25–26 (discussing an instance in which a dual character to the Emperor comes into play as he can renounce being a “One God” God while retaining his other character as a descendant for the Sun Goddess, and hence a Divine heritage).

<sup>128</sup> See, e.g., BURUMA, *supra* note 17, at 55–57; KITAGAWA, *supra* note 82, at 175–176, 185, 201–203; ROSS, *supra* note 86, at 141–143.

<sup>129</sup> Brett, *supra* note 81, at 19–20, 24.

<sup>130</sup> DAIKICHI IROKAWA, THE AGE OF HIROHITO: IN SEARCH OF MODERN JAPAN 126–128 (Mikiso Hane & John K. Urda trans., 1995).

<sup>131</sup> HELEN HARDACRE, SHINTO AND THE STATE, 1868–1988, at 40 (John F. Wilson ed., 1989).

<sup>132</sup> See Smythe, *supra* note 79, at 492.

<sup>133</sup> See, e.g., DOWER, *supra* note 85, at 216–217, 221; MORGAN, *supra* note 54, at 38–39, 60–65.

a new Emperor, making it easy to transition from a symbolic Emperor to a heavenly Emperor with implied powers inherent in a Head of State unshackled from consent of the Cabinet for his acts and who has no constitutional obligation to respect the Constitution. Article 24 of the Imperial Household Law (the law that governs accession, succession, and various aspects of the imperial family's life) requires a new Emperor to go through an accession ceremony, the precise nature of which is undefined. The Shinto ceremony known as *Daijosai* is part of the enthronement. Various explanations of the function and what occurs during this ceremony have been put forward. The Imperial Household Agency explains on its website only that it involves the offering of new rice to the acceding Emperor's ancestors.<sup>134</sup>

Mystery surrounds the fundamental question of whether by performing this ceremony—which takes place in part in the dead of night within a temple—the Emperor, notwithstanding Emperor Hirohito's renunciation of any claim to being a living god, becomes a Kami spirit or god.<sup>135</sup> That mystery and the incomplete nature of the Emperor's declaration have left room for those who wish to return the Emperor to his pre-war status to argue that nothing has changed.<sup>136</sup> The *Daijosai*, full of mystery,<sup>137</sup> was tied to the Kami-like status of the Emperor in the Meiji Constitution and earlier eras.<sup>138</sup> It is tied to the Emperor's claimed lineage back to the dawn of Japan, to the Sun Goddess, to the numerous Emperors before him.<sup>139</sup>

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<sup>134</sup> *Enthronement and Ceremonies*, THE IMPERIAL HOUSEHOLD AGENCY, <http://www.kunaicho.go.jp/e-about/seido/sokui.html>.

<sup>135</sup> See ELLWOOD & PILGRIM, *supra* note 28, at 22 (explaining linkage between the *Daijosai* and divine emperorship); SHILLONY, *supra* note 120, at 258–259 (discussing Emperor Akihito's *Daijosai*); ROBERT HARVEY, *AMERICAN SHOGUN: MACARTHUR, HIROHITO, AND THE AMERICAN DUEL WITH JAPAN*, 454–456 (2006).

<sup>136</sup> David Kenley, *History and Memory: The Role of War Memorials and Museums in China and Japan*, 14 EDUCATION ABOUT ASIA 5, 10–11 (2009); Jonathan Watts, *Japan's revisionists turn emperor into a god once more*, THE GUARDIAN (Aug. 20, 2002), <http://www.theguardian.com/world/2002/aug/21/japan.jonathanwatts>.

<sup>137</sup> See generally THE CULTURE OF SECRECY IN JAPANESE RELIGION (Bernhard Scheid & Mark Teeuwen eds., 2006) (discussing the significance of mystery in Japanese religion).

<sup>138</sup> Manabu Waida, *Buddhism and National Community in Early Japan*, in TRANSITIONS AND TRANSFORMATIONS IN THE HISTORY OF RELIGIONS 221, 229–231 (Frank B. Reynolds & Theodore M. Ludwig, eds., 1980).

<sup>139</sup> See, e.g., JOHN S. BROWNLEE, *JAPANESE HISTORIANS AND THE NATIONAL MYTHS 1600–1945: THE AGE OF THE GODS AND EMPEROR JIMMU 4–7* (1994) (discussing how the creation myth and the Emperor's direct lineage to the Sun Goddess was generally accepted by Japanese society from as early as the Yamato Kingdom of the 7th or 8th Century through the Pacific War and still holds sway in some segments of the population—it was the linchpin for the Emperor's special status and vessel of Japanese sovereignty).



Theories are that it transforms the Emperor into a living Kami,<sup>140</sup> that he is responsible for the Japanese people, even that he gathers into himself the spirit of previous Emperors going back to Jimmu.<sup>141</sup> Theories abound and can be created to fit one's belief or agenda.

While the Supreme Court allowed the expenditure of government funds for the *Daijosai* when Emperor Akihito was enthroned, it did so on the fiction that the ceremony was secular and was required to complete the formalities of accession.<sup>142</sup> Adoption of the amendment allowing government involvement in traditional ceremonies would permit recognition of *Daijosai* as a Shinto ceremony because it is traditional, and thereby opens the door to recognizing the religious significance of the ceremony—a door currently closed because of the Constitution.<sup>143</sup> Once opened, the path towards recognition of the Emperor as a living Kami would be made respectable and constitutional, supporting the Emperor's pre-war *Kokutai* status.

The history of Japan is filled with situations in which the Emperor was used by a faction to overturn or attempt to overturn a government – the Meiji Restoration being the most recent. If the Tenno were to become the Head of State with the ability to perform traditional religious functions, it could dramatically change the relationship of the people and government to the Emperor.<sup>144</sup> A Tenno Head of State performing Shinto ceremonies in Shinto shrines as an intermediary between the people and their ancestors provides a handy tool for mischief.<sup>145</sup> It should not be forgotten that the

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<sup>140</sup> Katsutoshi Takami, *From Divine Legitimacy to the Myth of Consensus, The Emperor System and Popular Sovereignty*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 9, 10–11 (Yoichi Higuchi ed., 2001).

<sup>141</sup> STUART D. B. PICKEN, ESSENTIALS OF SHINTO: AN ANALYTICAL GUIDE TO PRINCIPAL TEACHINGS 82–87 (Charles Wei-hsun Fu ed., 1994).

<sup>142</sup> QUIGLEY, *supra* note 8, at 62, 78 (describing how Emperor Akihito's accession ceremony spawned legal challenges because government money was unconstitutionally used for a religious ceremony. Courts concluded the ceremony was essentially secular and required to install the new Emperor. The Cabinet declared it secular—reminiscent of the pre-war government's declaration that Shinto was not a religion and Shinto shrines not religious; SHILLONY, *supra* note 120, at 258 (describing how the accession ceremony justified use of government money because it was a private ceremony of the imperial family to uphold the status). See Takamori Akinori, *Daigosai*, ENCYCLOPEDIA OF SHINTO, (Jan. 29, 2007), <http://eos.kokugakuin.ac.jp/modules/xwords/entry.php?entryID=883> (explaining how *daijosai* is, of course, recognized as an ancient Shinto ceremony); see also Steven R. Weisman, *Akihito Performs His Solitary Rite*, N.Y. TIMES (Nov. 23, 1990), <http://www.nytimes.com/1990/11/23/world/akihito-performs-his-solitary-rite.html>.

<sup>143</sup> JERROLD M. PACKARD, SONS OF HEAVEN: A PORTRAIT OF THE JAPANESE MONARCHY 18–21 (1987).

<sup>144</sup> Brett, *supra* note 81, at 25–28.

<sup>145</sup> See Kades, *supra* note 33, at 215, 234 (discussing importance of making the Emperor's role unambiguous).



Meiji oligarchs enhanced the status of and Kami-like nature of the Meiji Emperor (enshrined in Tokyo's Meiji Shrine) and then used the young Emperor Meiji to carry out their authoritarian government policies. A future Japanese leader (perhaps yet unborn) with authoritarian tendencies could similarly use a heavenly Emperor Head of State with authority to perform Shinto religious ceremonies because they are part of etiquette or are considered traditional to displace Japan's fragile democracy with an authoritarian regime.

iii. *Removing Individuality and the Guarantee of Fundamental Human Rights from the Constitution's Text*

Article 13 of the Constitution requires that all of the people (*kokumin*, i.e., Japanese people) be treated as individuals and that legislation focus on their rights to life, liberty, and pursuit of happiness moderated by public welfare considerations. However, reminiscent of the Meiji State's emphasis on group compliance and public order, select amendments proposed by the LDP intend to strike treating people as individuals to treat them instead as a "people."<sup>146</sup> In addition, the LDP proposes a new heading and additional text for Article 12, emphasizing the public's responsibility not to abuse constitutional rights, and to recognize that freedom and rights are balanced by duties and obligations.<sup>147</sup> The LDP also suggests removing Article 97

<sup>146</sup> See Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 1970 (A) no. 1310, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], [http://www.courts.go.jp/app/hanrei\\_en/detail?id=38](http://www.courts.go.jp/app/hanrei_en/detail?id=38) (Japan) (explaining the significance of the Constitutional recognition of individuality was commented on by Justice Tanaka in his concurring opinion wherein the Court struck down enhanced punishment for patricide: "The clause that 'every person of this country should be respected as an individual' . . . declares a fundamental idea of regarding the respect of individual dignity as an origin of all the values, and that the guarantee of the equality of every individual is the fundamental principle and the basis of democracy . . . every unreasonable discrimination ascertained in the light of the fundamental principle of democracy to respect and to guarantee individual dignity and individual values, should be considered invalid as violating of the spirit of this provision." His view has not been applied by the Court in later decisions.

<sup>147</sup> Young Lawyer's Association for the Future of Freedom, *supra* note 13. See also Voices of Overseas Youth for Civic Engagement, *supra* note 44; Kyodo News, *Komeito may opt against right to good environment amendment in Constitution*, JAPAN TIMES (Mar. 23, 2015), [http://www.japantimes.co.jp/news/2015/03/23/national/politics-diplomacy/komeito-may-opt-against-right-to-good-environment-amendment-in-constitution/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=komeito-may-opt-against-right-to-good-environment-amendment-in-constitution#.VUa-tL10zIV](http://www.japantimes.co.jp/news/2015/03/23/national/politics-diplomacy/komeito-may-opt-against-right-to-good-environment-amendment-in-constitution/?utm_source=rss&utm_medium=rss&utm_campaign=komeito-may-opt-against-right-to-good-environment-amendment-in-constitution#.VUa-tL10zIV) (describing how lawmakers are considering new Constitutional obligations on the part of the State to protect the environment which are likely to be dropped); European Commission Press Release IP/14/324, The Commission, Environment: Commission takes Greece to court over failure to protect iconic species (Mar. 28, 2014), [http://europa.eu/rapid/press-release\\_IP-14-324\\_en.htm](http://europa.eu/rapid/press-release_IP-14-324_en.htm) (stating that the European Commission is suing a European State to compel it to meet its obligation to protect the environment); David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENVIRONMENT MAGAZINE (July-August 2012)

(which currently recognizes that fundamental human rights are “fruits of the age-old struggle of man to be free”). This would be an effort to emphasize public order over the rights of the people, and to acknowledge that the rights granted by the Emperor to his subjects in the Meiji Constitution were a gift from the Emperor, and that the grant of rights in the LDP-amended Constitution is also a grant from the Emperor, not fundamental rights applicable to all humanity.<sup>148</sup> While the LDP’s considered amendments would acknowledge that “respect” be given to fundamental human rights elsewhere in the Constitution, respect for rights is not equivalent to a guarantee of the rights in the Constitution; a right may be respected but nonetheless restricted or violated by legislation.<sup>149</sup>

The idea that each person, each individual, has fundamental human rights was a basic idea of the Enlightenment period that informed the writers of the Constitution of the United States, but was rejected by Ito Hirobumi when drafting the Meiji Constitution. The Meiji oligarchs, pre-war Japanese leaders, and schools rejected individualism,<sup>150</sup> and used the Rescript on Education, *The Way of the Subject*, as well as the Peace Preservation Law to stifle individualistic thought.<sup>151</sup> The Ministry of Education’s definitive explanation of *Kokutai* noted that the Japanese were unique and superior partly because they rejected individualism.<sup>152</sup> Notwithstanding the 1947 Constitution’s emphasis on individual rights, Japanese schools continue their

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<http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>; The Liberal Democratic Party of Japan, *Draft for the Amendment of the Constitution of Japan: in contrast to the current Constitution* (Apr. 27, 2012), <http://www.voyce-jpn.com/ldp-draft-constitution> (proposing consideration be given to the rights of crime victims (likely permitting crime victim’s rights to balance and diminish rights of the accused and the presumption of innocence) and to protect citizens abroad (opening the door to demands that the SDF be used to free Japanese hostages or other Japanese citizens who either the government, or a particularly strong interest group, might conclude are wrongfully held in a foreign State. Government inaction might be seen as violating their Constitutional duty leading to the same type of “sincere belief” excuse for actions—including assassinations—that brought down civil government in the lead up to the Pacific War).

<sup>148</sup> Jones, *supra* note 44.

<sup>149</sup> It can be argued that rights were “respected” by the Meiji Constitution through the Constitution’s reference to them. Nonetheless the right was subject to legislation.

<sup>150</sup> BROWN, *supra* note 90, at 104–105.

<sup>151</sup> See Sharon H. Nolte, *National Morality and Universal Ethics, Onishi Hajime and the Imperial Rescript on Education*, 38 *MONUMENTA NIPPONICA* 283 (1983); BROWN, *supra* note 90, at 222–225; Mitchell, *supra* note 26, at 317, 319, 322, 323, 343; ROSS, *supra* note 86, at 143. The denigration of individualism may be traced to the Tokugawa status system as the “group” one belonged to was the class one was assigned upon birth. HANE & PEREZ, *supra* note 3, at 21. See TSUNODA ET AL., *supra* note 29, at 139–140, for the text of the Rescript on Education.

<sup>152</sup> DOWER, *supra* note 85, at 221–223; WRAY, *supra* note 81, at 408–410.

pre-war role of teaching children how to conform as part of their group<sup>153</sup> and modern Japan remains dominated by a “consensus” or group model.<sup>154</sup> Japan’s modern leaders share their predecessor’s rejection of individuality.<sup>155</sup> Individualism is deemed inconsistent with the “uniqueness” that adheres to the Japanese as a group and compels individuals to subordinate their individuality to the unique Japanese group, culture, values and thought process.<sup>156</sup> This group emphasis is moderated in the public sphere by the Constitution’s grant of individual rights that allows individuals to swim against the group tide and, for example, speak out in opposition to the prevailing majority opinion or sue the State (or their employer or third parties) for violating the individual’s rights. But, there is a contradiction of

<sup>153</sup> Robert Aspinall, *Violence in Schools: Tensions Between the “Individual” and the “Group” in the Japanese Educational System*, in CRITICAL ISSUES IN CONTEMPORARY JAPAN 235, 236–240 (Jeff Kingston ed., 2014). Although the Occupation failed in its attempt to make individuality a core value in Japan (See MASUDA, *supra* note 36, at 217–218) there is evidence that some educators at the university level recognize that the effort to downplay individuality is part of an objective to turn a rights based constitution into a public order based constitution. See, e.g., Takuya Asakura, *University chancellor: Embrace individualism, be wary of constitutional revision*, in ASAHI SHIMBUN (May 1, 2015), [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201505010008](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201505010008).

<sup>154</sup> See, e.g., Anne Imamura, *Family Culture*, in THE CAMBRIDGE COMPANION TO MODERN JAPANESE CULTURE 76 et seq. (Yoshio Sugimoto ed., 2009); INOUE, *supra* note 8, at 231–235; PATRICK SMITH, JAPAN: A REINTERPRETATION 112–20 (1997). Many times “rights” are seen from a group rather than individual perspective. Carl F. Goodman, *The Evolving Law of Document Production in Japanese Civil Procedure: Context, Culture, and Community*, 33 BROOK. J. OF INT’L LAW 125 (2007); EDWIN O. REISCHAUER & MARIUS B. JANSEN, THE JAPANESE TODAY: CHANGE AND CONTINUITY 128 (1998); Charles R. Fenwick, *Culture, Philosophy and Crime: The Japanese Experience*, 9 INT’L J. OF COMP. & APPLIED CRIM. JUST. 67, 71–72 (1985); Haim Weinberg, *The Culture of the Group and Groups from Different Cultures*, 36 GROUP ANALYSIS 253, 260 (2003); YASUMASA KURODA, THE CORE OF JAPANESE DEMOCRACY 149 (2005).

<sup>155</sup> Japan’s judiciary has rejected individuality. In cases involving surrogate birth or in vitro fertilization, the Supreme Court focuses not on the rights of the surrogate, egg or sperm donors, genetic parents or the children conceived and/or born as a consequence but rather on whether society approves of the procedure as shown by statute allowing it. See SAIKŌ SAIBANSHO [Sup. Ct.] Sept. 4, 2006, 2004 (Ju) 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHU] 7 (holding that posthumously conceived child not registered in deceased husband’s family register, although the sperm had been harvested specifically for the purpose of in vitro fertilization – interests of the child are subordinated to “public interest”); SAIKŌ SAIBANSHO [Sup. Ct.] Mar. 23, 2007, 2006 (Kyo) 47, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHU] 2 (holding that children conceived with egg and sperm of married Japanese couple but carried by a surrogate in the United States was not allowed to be registered in genetic father’s family register notwithstanding that the surrogate claimed no rights, the genetic parents wanted registration, U.S. law allowed the process, and a U.S. court certified that the Japanese parents were the child’s natural parents, and such registration was in the best interests of the child). Cf. SAIKŌ SAIBANSHO [Sup. Ct.] Dec. 10, 2013, 2013 (Kyo) 5, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHU] 9 (holding that a child born to a couple, one of whom suffered from gender identity disorder and had a sex change but could not have been the genetic father of the child, could be added to father’s family registry because the law allowed for change of sex of the GID parent, indicating societal approval).

<sup>156</sup> DALE, *supra* note 85, at 20–23.

sorts – societal norms in Japan are group oriented while the law and constitution’s orientation is individual focused in order to protect each individual’s rights. The amendments would turn the Constitution’s attention (and hence the law’s attention) away from individual rights and towards the *obligations* that human beings owe to society, community, and ultimately, the Japanese State<sup>157</sup> consistent with *The Way of the Subject* (required reading for Japanese troops)<sup>158</sup> and the *Fundamentals of Our National Polity* that spelt out the nature of the Japanese *Kokutai* and rejected individuality.<sup>159</sup>

Article 12 of the 1947 Constitution already specifies that freedom and rights come with responsibility and obligations, a provision that is substantive, and not just “window dressing.” Article 12 reads:

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.<sup>160</sup>

In the *Tokyo Metropolitan Public Safety case*, the Supreme Court upheld a Tokyo ordinance that required the permission of the Metropolitan Public Safety Commission before a mass demonstration could be held in Tokyo—whether on public ways or private property.<sup>161</sup> The Court therefore recognized that freedom of expression guaranteed by Article 21 of the 1947 Constitution is “eternal and inviolate,” and is a fundamental human right that, like all other human rights granted by the Constitution, is subject to Article 12’s public welfare and abuse limitation. The Court concluded that because the ordinance did not “unreasonably” abridge freedom of expression

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<sup>157</sup> *VOX POPULI: The constitutional debate over 'human beings' vs. 'individuals'*, ASAHI SHIMBUN, (Feb. 24, 2014) <http://ajw.asahi.com/article/views/vox/AJ201402240045>.

<sup>158</sup> DOWER, *supra* note 85, at 26.

<sup>159</sup> See Tsunoda et al., *supra* note 29, at 278–288, for excerpts from *Fundamentals of our National Polity* (Introduction).

<sup>160</sup> KENPŌ art. 12.

<sup>161</sup> The Ordinance reads, in part: “Article 1. A permission of the Metropolitan Public Safety Commission (hereinafter referred to as the Public Safety Commission) is required in order to hold a meeting or mass parade on the road or other public places, or engage in mass demonstration irrespective of places. However, cases that come under any item of the following are excepted from the provision of the present article. 1. Picnics or educational trips of students and pupils, physical education meetings and sports meetings. 2. Established functions such as the ceremonies of coming of age, marriage, funeral, and ancestral worship.” SAIKŌ SAIBANSHO [Sup.Ct.] July 20, 1960, 1960 (A) 112, SAIKŌ SAIBANSHO HANERISHŪ [SAIBANSHO WEB] [http://www.courts.go.jp/app/hanrei\\_en/detail?id=15](http://www.courts.go.jp/app/hanrei_en/detail?id=15) (quoting ordinance).

or exceed what was required for public welfare, it was constitutional.<sup>162</sup> Because Article 12 already permits “reasonable” limitations on fundamental human rights, it is proper to ask: “what does the amendment to Article 12 emphasizing the public’s responsibility not to abuse their rights and to recognize that freedom and rights are balanced by duties and obligations seek to achieve?” Clearly it is to emphasize and make clear that actions that disturb the public interest and public order constitute an abuse of and thus are outside the ambit and protection of constitutional rights, thereby reinforcing Article 12’s restriction on fundamental human rights so that in a clash between the obligation not to abuse constitutional rights and an individual’s constitutional right, the public order and public interest should prevail.

The Supreme Court of Japan has applied a balancing test under which rights granted to individuals under the Constitution (in the case at issue the rights of a criminal suspect), must be balanced against the constitutional right of the State (the prosecutor) to perform its functions, and in the process, has denied criminal suspects many of their constitutional rights. The consequence has been to interpret the Criminal Procedure Code provisions as defining the constitutional rights granted to suspects and accused persons.<sup>163</sup> By placing rights of the citizens on the same constitutional plane as citizens’ *obligations* to the public order and public good,<sup>164</sup> the Constitution would now require that each right contained in the Constitution be balanced against a public order or public good limitation,

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<sup>162</sup> *Id.* At times the SDF force (and other governing bodies) may question and obtain personal information (political affiliation, employment, etc.) from demonstrators. A High Court held in early 2016 that such activities violated the privacy of demonstrators, but allowed only approximately \$1,000 in damages to a single demonstrator and refused to enjoin such activities in the future. *High court upholds damages payment over SDF intelligence activities*, MAINICHI (Feb. 02, 2016) <http://mainichi.jp/english/articles/20160202/p2g/00m/0dm/052000c>.

<sup>163</sup> In a 1999 case the Grand Bench of the Supreme Court permitted the prosecutor to question a suspect even after the suspect requested to meet with counsel. The Court recognized that the Constitution gave the suspect the right to meet but because the right to punish those who commit crimes is presumed by the Constitution, this State function has constitutional recognition placing it on a par with the right to consult with counsel. Accordingly, the Diet may strike a “reasonable” balance between these two constitutionally recognized rights. The accused right is not given priority over the State’s right to punish the guilty. The State’s right (per Code of Criminal Procedure) to question a suspect outside the presence of counsel for twenty-three days is a reasonable balance. Saikō Saibansho [Sup.Ct.] Mar. 24, 1999, 1993 (O) 1189, SAIKŌ SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 1, [http://www.courts.go.jp/app/hanrei\\_en/detail?id=433](http://www.courts.go.jp/app/hanrei_en/detail?id=433).

<sup>164</sup> It can be argued that public order and public good includes “social order” which would appear to contemplate an obligation not to disturb accepted social order. *See Repeta, supra* note 44.

which either was or was not defined in a legislative pronouncement.<sup>165</sup> The effect of the amendments would codify the existing prioritization of societal rights over individual rights in the criminal law arena and extend that prioritization to other areas of the law thereby limiting constitutional rights to legislative definitions of public interest and public order, resurrecting the Matsumoto draft of the Constitution and the Meiji Constitution's limitation of rights to only such rights as are granted by the government (i.e., rights set out in the Constitution and not taken away or modified by legislation are granted, whereas those taken away or limited by legislation are denied as long as the legislation is "reasonable"). Legislation would define the public order and would define what rights the people had by defining when the exercise of a right was inconsistent with the constitutional duty to conform to the public good and public order. Worse yet, lack of legislation defining the meaning of constitutional rights would leave open the question of whether the exercise of the right conformed to the Constitution; this would allow the executive and accommodating bureaucratic judiciary to decide if the individual made a mistake in understanding what was or was not in the interest of the public order, as was the case for Professor Minobe in the 1920s and 1930s.<sup>166</sup> The desired constitutional change is reminiscent of the 1934 law that increased the penalties for acts inconsistent with the public order, which caused a dissenting Diet member to complain that "public order" was subject to very broad interpretation, suggesting the amendment would be extremely dangerous.<sup>167</sup>

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<sup>165</sup> The Court has even balanced the free speech rights of citizens who object to government policy to the "privacy" rights of citizens who do not want handouts dropped in their publicly available mailboxes - the privacy right has prevailed. See GOODMAN, *supra* note 88, at 160-161. On the other hand, high volume broadcasts of right wing speeches from moving vehicles are permitted as free speech. Daniel Dolan, *Cultural Noise: Amplified Sound, Freedom of Expression and Privacy Rights in Japan*, 2 INT'L J. COMM. 662, 664 (2008).

<sup>166</sup> In 2007, the Court upheld a criminal conviction finding that an ordinance designed to discourage motorcycle gangs by prohibiting them from demonstrating or congregating in public while wearing clothing that shows the name of the motorcycle group or was "peculiar" was too broadly worded. However, since arrests could only be made after a warning from a city official, the conviction was affirmed. The court found that the warning was sufficient to disclose that the action was in violation of the ordinance, regardless of the ordinance's vague and overbroad wording. Two Justices dissented. To the majority it seemed clear that the defendant, once warned, should have known that the ordinance applied to him. The free speech issue was not discussed, apparently because it was clear that the ordinance was acceptable under Article 12, and as one Justice put it, the feeling of the public had to be considered (i.e., public order and public welfare). Saikō Saibansho [Sup.Ct.] Sep. 18, 2007, 2005 (A) 1819 SAIKŌ SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 1, [http://www.courts.go.jp/app/hanrei\\_en/detail?id=911](http://www.courts.go.jp/app/hanrei_en/detail?id=911) (Horigomi, J., concurring).

<sup>167</sup> See KASZA, *supra* note 29, at 127-128.



Contemplated Article 12 would be a rejection of what today is virtually a universal view among true democracies; namely, a significant purpose of a written constitution is to prevent government abuse by guaranteeing its peoples' rights against the government, not to place obligations, including the obligation to conform to the government's definition of public interest and public order, on the public. It would represent a new and troubling form of Japanese uniqueness.<sup>168</sup>

Instead of Article 97's recognition of fundamental human rights, people would be treated as "people" (or "humans") rather than individuals. But the LDP amendments do not define what rights adhere to being a person or human.<sup>169</sup> By implication they are not what are generally understood to be "fundamental human rights," such as those promulgated by the Universal Declaration of Human Rights (which Japan has signed), because the term "fundamental human rights" is being specifically removed from the Constitution.<sup>170</sup> An LDP pamphlet makes clear that Western ideas of natural rights should be rejected.<sup>171</sup>

Removal of Article 97 may have meaning by negative implication. It is not all people who are entitled to the rights set out in the Constitution, but only the citizens of Japan (*kokumin*). Thus, the citizens of Japan are granted the rights under the Constitution to be treated as humans, but how are non-citizens to be treated? If a constitutional provision to treat Japanese people as humans or people is required (rather than recognition of the fundamental nature of human rights that apply to all humans) then by negative implication non-Japanese people, who are not granted the right to be treated like people, lack the right granted to Japanese citizens to be treated like people. Aside from the paternalism reflected by such language, if applied to bears this would mean that Japanese bears shall be treated as bears – North American black bears, Russian bears, or polar bears would, by negative implication have no right to be treated as bears. The residents of Japan who

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<sup>168</sup> The change could also remove the Constitution's function as supreme law, as it would only be supreme law if the legislature did not pass a conflicting or limiting statute.

<sup>169</sup> The phrase "fundamental human rights" has real meaning. Through such documents as the Universal Declaration of Human Rights those fundamental rights are defined. See JOSEPH WRONKA, HUMAN RIGHTS AND SOCIAL POLICY IN THE 21ST CENTURY 227 (rev. ed. 1998); Onuma Yasuake, *Towards a More Inclusive Human Rights Regime*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 110–114 (Joanne R. Bauer & Daniel A. Bell, eds., 1999).

<sup>170</sup> It is reported that the intention is to rid the Japanese Constitution of Western enlightenment human rights theories. Smith, *supra* note 56.

<sup>171</sup> Lawrence Repeta, *Limiting Fundamental Rights Protection in Japan: The Role of the Supreme Court*, in CRITICAL ISSUES IN CONTEMPORARY JAPAN 49 (2013).



are not citizens would be outside the frame of fundamental human rights and thus would have no constitutional right to be treated by the Japanese government as people or humans. Could they be treated as somewhat less human than their Japanese neighbors? Would Japan be obligated to treat people outside Japan as human?<sup>172</sup> Could all non-Japanese wherever located be treated as something less human than Japanese?<sup>173</sup>

Such a provision would be particularly harmful to “Special Permanent Residents” of Japan, defined as Korean residents at the time of surrender who were not repatriated to Korea and lost their Japanese citizenship when Japan recognized and signed the San Francisco Accords treaty with South Korea (and their progeny who as a consequence are not children of Japanese citizens and therefore are not Japanese citizens as a consequence of birth in Japan).<sup>174</sup> Such negative implication arising from restricting the right to be treated as a person or human to Japanese citizens is supported by the proposed change to the Preamble that would refer to the special quality of the Japanese people as a “unique” society, and is reminiscent of pre-war commentary describing western countries who floundered in individualism as inferior to Japan’s unique society.<sup>175</sup> It would turn the Constitution’s role of reversing the pre-war era’s beliefs of racial superiority on their head. This would support a return of the pre-war *Kokutai*, which favored the family State under the sovereign Emperor, as head of the Japanese house, entitled to obedience from other house members, as well as spiritual leader and *Kami* under State Shinto. Here, Japanese uniqueness (and superiority) was based on their Emperor’s and his ancestor’s direct descent from the Sun Goddess and the people’s relationship to other *Kami* and to their Emperor.<sup>176</sup>

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<sup>172</sup> See HIDETOSHI HASHIMOTO, *THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA* 55–64 (2004), for the view that fundamental human rights are universal and a list of treaties recognizing human rights.

<sup>173</sup> Article 97 reads: “The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.” NIKHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 97.

<sup>174</sup> Saikō Saibansho [Sup.Ct.] Apr. 5, 1961, 1955 (O) 890, SAIKŌ SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 1, [http://www.courts.go.jp/app/hanrei\\_en/detail?id=17](http://www.courts.go.jp/app/hanrei_en/detail?id=17) (holding that a Japanese woman married in 1935 to a man of Korean ancestry—who was a Japanese resident in Japan, a citizen of pre-war Japan, and entered into his Family Register—was denied Japanese citizenship as a result of South Korea/Japan Peace Treaty and could not return to her father’s Japanese Family Register and lost her Japanese citizenship).

<sup>175</sup> See, e.g., JANSEN, *supra* note 29, at 642; DOWER, *supra* note 85, at 203–05, 211, 216–17.

<sup>176</sup> See ROSS, *supra* note 86, at 144–150; WRAY, *supra* note 81, at 408–410, for the relationship of rejection of individuality with *Kokuta*.

iv. *Speech, Association and Other Activities Contrary to Public Order Would Not Be Constitutionally Protected if the LDP Amendments were Adopted*

As noted above, the Supreme Court of Japan has already held that Article 12 moderates Article 21's grant of freedom of assembly, association, speech, press, other forms of expression, and the contemplated amendments seek to strengthen such moderation by emphasizing the people's *obligation* not to abuse any constitutional rights by defining abuse as actions that are inconsistent with public interest and the public order. To drive home the point that speech and association rights are limited to speech and association activities that are in conformity to the public interest and public order (and hence not an abuse of the speech and association right) an additional paragraph would be added to Article 21 making clear that activities designed to change the public order are outside constitutional protection. Placement of this new paragraph in the freedom of assembly and association Article makes clear that its purpose is not simply to restrict organizing or demonstrating for the purpose of changing the public order but also directly attacks speech, association, press reporting, commentary, and other expressive forms that support change in (and hence are activities that are not in conformity with) the existing definition of public order.<sup>177</sup>

The fear of free speech and association mirrors concerns of the early Meiji and pre-war periods in which freedom of speech was severely restricted by legislation that made it a crime to attempt to change the political system. Speaking out for a different interpretation of *Kokutai* was unlawful. Ideas that challenged the government's view of public order were silenced before they could lead to public debate.<sup>178</sup> Consistent with Ito Hirobumi's understanding of the Meiji Constitution that he drafted, the contemplated addition would draw a distinction between thought (which would be free), and activities (such as speaking or otherwise publicizing the thought) that would be restricted to matters consistent with upholding

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<sup>177</sup> See Repeta, *supra* note 44.

<sup>178</sup> ELISE K. TIPTON, THE JAPANESE POLICE STATE – THE TOKKO IN INTERWAR JAPAN 62–65, 132 (1990); *Rare 1941 'Thought Police' Training Document Discovered*, MAINICHI (Aug. 2, 2015), <http://mainichi.jp/english/english/newsselect/news/20150802p2a00m0na005000c.html>.

“public order.”<sup>179</sup> Public order would be defined by the government as it was in the 1930s.<sup>180</sup>

Speech and press freedoms in Japan are already significantly limited.<sup>181</sup> Mass demonstrations are subject to police approval under local ordinances, although approval is usually (but not always) given because of concern that failure to do so would violate the Constitution.<sup>182</sup> That could change if association for purposes of changing the public order were excluded from constitutional protection. Moreover, the paragraph the LDP would add to Article 12 would open the door to more restrictive regulation, as the legislature or bureaucrats expanded the definition of public order narrowing the space for free speech and expression. The 1947 Constitution has not been interpreted to prohibit severe restrictions on campaign activities and endorsements of candidates by ordinary citizens and the press during the all-important election period immediately prior to voting.<sup>183</sup> These restrictions are specifically designed to limit activities that could affect the results of the election, and thus, a newspaper editorializing or providing information during the election period as to why it believes candidate A is preferable to candidate B would be violating the law.<sup>184</sup> Presently, individual candidates in single seat districts are restricted as to how much

<sup>179</sup> HIROBUMI ITO, *supra* note 7, at 61–62.

<sup>180</sup> In 1934, a Diet member objecting to proposed legislation increasing punishment for acts inconsistent with public order noted that the change was dangerous because of the broad meaning that could be given to “public order.” The law was enacted. See KASZA, *supra* note 29, at 127–128.

<sup>181</sup> See generally, GOODMAN, *supra* note 88, at 155–179. Japan has steadily fallen in rankings of press freedom so that it is no longer in the top sixty of the 180 countries ranked by Reporters Without Borders (Japan was ranked at seventy-two in 2016). See Ayako Mie, *Japan’s government defends against multiple accusations of stifling press freedom*, JAPAN TIMES, (Apr. 21, 2016), [http://www.japantimes.co.jp/news/2016/04/21/national/japans-government-defends-multiple-accusations-stifling-press-freedom/#.VxlhDojD\\_nM](http://www.japantimes.co.jp/news/2016/04/21/national/japans-government-defends-multiple-accusations-stifling-press-freedom/#.VxlhDojD_nM).

<sup>182</sup> See generally, *Himeji city gov’t apologizes for halting anti-Abe gathering*, MAINICHI (OCT. 1, 2015), <http://mainichi.jp/english/english/newsselect/news/20151001p2a00m0na004000c.html>.

<sup>183</sup> See, e.g., Masahiro Usaki, *Restrictions on Political Campaigns in Japan*, 53 L. & CONTEMP. PROBS. 133 (1990); Alex Klein, *The Puzzle of Ineffective Election Campaigning in Japan*, 12 JAPANESE J. POL. SCI. 57, 59 (2011); Matthew J. Wilson, *E-Elections: Time for Japan to Embrace Online Campaigning*, 2011 STAN. TECH. L. REV. 4 (2011), <http://str.stanford.edu/pdf/wilson-e-elections.pdf>; see also, Matthew J. Wilson, *Essay, E-Elections: Law in Asia & Online Political Activities*, 12 WYO. L. REV. 237 (2012).

<sup>184</sup> In a recent Tokyo Governor’s race, the LDP candidate supported the LDP’s position that nuclear power plants should be restarted while the opposition candidate (former Prime Minister Hosakawa) ran on a non-nuclear platform. A NHK news commentator resigned when the government owned station advised him that he could not comment on questions concerning nuclear power as that could affect the election. See Martin Fackler, *Japan’s Public Broadcaster Faces Accusations of Shift to the Right*, N.Y. TIMES (Jan. 31, 2014), <http://www.nytimes.com/2014/02/01/world/asia/japans-public-broadcaster-faces-accusations-of-shift-to-the-right.html>.

TV time they can buy. Party candidates running in both the single seat and proportional representative contests can benefit from the party's ability to set forth policy positions that inure to their benefit as single seat district candidates. This benefit to party candidates has been upheld by the judiciary on the grounds that they support a "level playing field" in elections notwithstanding the restrictions that actually favor party designated candidates over independent candidates.<sup>185</sup>

The inhibiting effect of campaign speech restrictions during the election period is demonstrated by the infamous "Tsubaki affair." Tsubaki was forced to resign and a media executive apologized before the Diet because the station had expressed anti-LDP political views during the 1993 election period (the election that brought into power the first non-LDP government since 1955).<sup>186</sup> To ensure that news media did not similarly disparage the LDP or its candidates, the LDP in the run up to the 2014 Lower House election wrote to the media reminding them of their duty to remain neutral in the campaign.<sup>187</sup> In early 2016, an Internal Affairs and Communication Minister reminded the press that she could remove them from the air if they failed to report news in an unbiased manner or programs were not consistent with the public interest.<sup>188</sup> Media outlets that own TV and/or radio stations that do not remain neutral must be concerned about government action when their licenses come up for renewal (generally every

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<sup>185</sup> The Court's decision was based on the importance of political parties to Japan's election system. See Saikō Saibansho [Sup. Ct.] Mar. 23, 2011, 2010 (Gyo-Tsu) 207, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ], [http://www.courts.go.jp/app/hanrei\\_en/detail?id=1097](http://www.courts.go.jp/app/hanrei_en/detail?id=1097).

<sup>186</sup> See LISBETH CLAUSEN, *GLOBAL NEWS PRODUCTION* 118–120 (2003); ELLIS S. KRAUSS, *BROADCASTING POLITICS IN JAPAN: NHK AND TELEVISION NEWS* 236–237 (2000); *NTV head bemoans pressure over LDP questioning*, MAINICHI (Apr. 30, 2015), <http://mainichi.jp/english/english/newsselect/news/20150428p2a00m0na005000c.html>.

<sup>187</sup> See *LDP letter to broadcasters urges neutral poll campaign reporting, draws criticism*, JAPAN TIMES (Nov. 28, 2014), <http://www.japantimes.co.jp/news/2014/11/28/national/ldp-letter-broadcasters-urges-neutral-poll-campaign-reporting-draws-criticism/#.VHh6Vbl0zIW>.

<sup>188</sup> See Tomohiro Osaki, *Sanae Takaichi warns that government can shut down broadcasters it feels are biased*, JAPAN TIMES (Feb. 9, 2016), [http://www.japantimes.co.jp/news/2016/02/09/national/politics-diplomacy/minister-warns-that-government-can-shut-down-broadcasters-it-feels-are-biased/#.Vrp\\_eYf2bIX](http://www.japantimes.co.jp/news/2016/02/09/national/politics-diplomacy/minister-warns-that-government-can-shut-down-broadcasters-it-feels-are-biased/#.Vrp_eYf2bIX); See also *Opposition slams Cabinet minister's comment on possibility of taking broadcasters off air*, MAINICHI (Feb. 10, 2016), <http://mainichi.jp/english/articles/20160210/p2a/00m/0na/016000c>; Editorial, *Gov't should not threaten autonomy of broadcasters*, MAINICHI (Feb. 10, 2016), <http://mainichi.jp/english/articles/20160210/p2a/00m/0na/017000c>; *Communications ministry defends minister's remarks about taking broadcasters off air*, MAINICHI (Feb. 13, 2016), <http://mainichi.jp/english/articles/20160213/p2a/00m/0na/009000c>.

five years).<sup>189</sup> It is reported that the head of the government-owned broadcaster, NHK, has instructed reporters to hew to the government line.<sup>190</sup> Japan now ranks sixty-one out of the 180 countries ranked by Reporters Without Borders for press freedom<sup>191</sup> and in 2016, was criticized by the UN Special Rapporteur for lack of press freedom.<sup>192</sup>

Self-censorship by the media, (whereby the media restricts its reporting activities to matter that comports with government policy) a staple of pre-war Japan, continues under Press Club membership and club “ethical rules”<sup>193</sup> that have standardized and eroded objective reporting while highlighting the government's view and policies and limiting news critical of the government.<sup>194</sup> The Press Club system, a carry forward from the Press Clubs of pre-war Japan, serve to enforce “self-censorship.” The neutrality/fairness doctrine may have contributed to the LDP’s success in the 2016 Upper House election as media outlets avoided discussion of issues affecting the election leaving voters unaware of the significance of granting the LDP (together with its allies favoring “constitution revisions”) a two-thirds majority in the Upper House.<sup>195</sup> Press Clubs are financially supported by the government body they are covering, reliant on their government

<sup>189</sup> See *Gov't intervention into TV programs raises question: Can autonomy be kept?*, MAINICHI (Feb. 8, 2016), <http://mainichi.jp/english/articles/20160208/p2a/00m/0na/012000c>.

<sup>190</sup> See Tomohiro Osaki, *NHK chairman's order to follow government line on Kyushu nuclear reactors sparks outcry*, JAPAN TIMES (Apr. 27, 2016), [http://www.japantimes.co.jp/news/2016/04/27/national/nhk-chairmans-order-follow-government-line-kyushu-nuclear-reactors-sparks-outcry/#.VyUW14jD\\_nM](http://www.japantimes.co.jp/news/2016/04/27/national/nhk-chairmans-order-follow-government-line-kyushu-nuclear-reactors-sparks-outcry/#.VyUW14jD_nM).

<sup>191</sup> See Ayako Mie, *supra* note 183; Toko Sekiguchi, *Japan Slips in Press Freedom Ranking*, WALL ST. J.: JAPAN REAL TIME (Feb. 13, 2015 5:40 PM JST), <http://blogs.wsj.com/japanrealtime/2015/02/13/japan-slips-in-press-freedom-rankings/>.

<sup>192</sup> See Yuri Kagemaya, *UN rights expert sees threats to press independence in Japan*, AP: THE BIG STORY (Apr. 19, 2016 2:46 AM EDT), <http://bigstory.ap.org/article/d4ce117bf8484129a0280f78b5dc3b88/un-rights-expert-sees-threats-press-independence-japan>.

<sup>193</sup> See LOUIS D. HAYES, *INTRODUCTION TO JAPANESE POLITICS* 125–127 (5th ed. 2009) for the role of Press Clubs in limiting reporting in Japan. Among the ethical standards adopted by Press Clubs are requirements for freedom and responsibility, wherein freedom is moderated by public interest. See *The Canon of Journalism*, PRESSNET: NIHON SHINBUN KYOKAI (adopted June 21, 2000), <http://www.pressnet.or.jp/english/about/canon/>. (“However, member newspapers must be duly aware of their heavy responsibility and be constantly mindful not to impair public interests”), accuracy and fairness, as well as decency and moderation, which includes “member newspapers ... should at all times exercise moderation and good sense” terms that can be used to limit hard hitting expose reporting and can require neutrality on issues; *Kisha Club Guidelines*, PRESSNET: NIHON SHINBUN KYOKAI (revised Mar. 9, 2006), <http://www.pressnet.or.jp/english/about/guideline/>; see also LAURIE ANNE FREEMAN, *CLOSING THE SHOP: INFORMATION CARTELS AND JAPAN'S MASS MEDIA* (2000) (ebook); GOODMAN, *supra* note 88, at 165–166.

<sup>194</sup> See WILLIAM DE LANGE, *A HISTORY OF JAPANESE JOURNALISM* 181–192 (1998); FREEMAN, *supra* note 195.

<sup>195</sup> See *TV stations claim they considered fairness in lack of election coverage*, MAINICHI (July 19, 2016), <http://mainichi.jp/english/articles/20160719/p2a/00m/0na/018000c>.

sources for information, and their members do not buck the agency line for fear of being cut out of future press conferences or information.<sup>196</sup> Reliance on information received at Press Club briefings is a defense to libel litigation while reliance on reports emanating from a reputable but independent news agency is not.<sup>197</sup> There is little substantive investigative reporting in Japan because the Press Club's hand-fed news is free from challenge in litigation and therefore enables news outlets to retain their favored status as Press Club members.<sup>198</sup> Assuming adoption of the amendment to the free speech Article, the critical question for Japanese news outlets would be whether reporting of embarrassing events or commentary critical of government policy, positions, or leaders, would be constitutionally protected, or whether such reporting and editorializing could be considered contrary to the public interest or public order. If reporting is outside public interest or order it lacks the protection of Article 12's free speech right. While such reporting may be considered acceptable today, at a future date could be considered contrary to public interest or public order, as was the case with Professor Minobe. The clearly ambiguous terms "public interest" and "public order" likely would result in even more self-censorship than currently exists.<sup>199</sup> In the long term, these restrictions could even be extended to permit the government to censor books, much like in the pre-war era when the publications ordinance permitted the Home Ministry to censor books on the basis that they disturbed public order or corrupted morals.<sup>200</sup>

The limits on speech, press, and association that Japan's government already imposes are moderated by the 1947 Constitution's speech, press, and

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<sup>196</sup> See generally, ADAM GAMBLE & TAKESATO WATANABE, *A PUBLIC BETRAYED: AN INSIDE LOOK AT JAPANESE MEDIA ATROCITIES AND THEIR WARNINGS TO THE WEST* 45–66 (2004); see also FREEDOM IN THE WORLD 2006: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 369 (Aili Piano, Arch Puddington & Mark E. Rosenberg eds., 2006) (describing Japan's Press Club System as an "obstacle" to press freedom in Japan).

<sup>197</sup> See Saikō Saibansho [Sup. Ct.] Jan. 29, 2002, 1995 (O) 1421, 56 Saikō Saibansho minji hanreishū [Minshū] 185.

<sup>198</sup> See, e.g., William Nester, *Japan's Recruit Scandal: Government and Business for Sale*, 12 *THIRD WORLD QUARTERLY* 91, 96–97 (Apr., 1990). Self-censorship has become so ubiquitous in Japan that the European Union has formally urged Japan to abandon the Press Club system. See Jonathan Watts, *EU acts to free Japanese media*, *THE GUARDIAN* (Nov. 29, 2002), <http://www.theguardian.com/world/2002/nov/29/worlddispatch.pressandpublishing>.

<sup>199</sup> See David McNeill, *Japan's contemporary media*, in *CRITICAL ISSUES IN CONTEMPORARY JAPAN* 64, 64–73 (Jeff Kingston ed., 2014); Linda Sieg, *Journalists In Japan Say There Is Growing Pressure To Self-Censor*, *REUTERS* (Apr. 26, 2015), [http://www.huffingtonpost.com/2015/02/24/japanese-media-self-censo\\_n\\_6741558.html](http://www.huffingtonpost.com/2015/02/24/japanese-media-self-censo_n_6741558.html).

<sup>200</sup> See, e.g., Emily Anderson, *Tamura Naomi's The Japanese Bride: Christianity, Nationalism, and Family in Meiji Japan*, 34 *JAPANESE J. RELIGIOUS STUD.* 203, 215 (2007).



association clauses. The new language sought would remove the moderating influence of the constitutional free speech right by only guaranteeing speech, press, and association rights to matter in the public interest or consistent with public order. Current government efforts to control information affect Japanese textbooks as the Ministry of Education has a dominating position concerning which textbooks are used and what they may say.<sup>201</sup> The Ministry claims that it acts to assure “historic fact” but its view of historic fact is frequently contested both domestically<sup>202</sup> and internationally.<sup>203</sup> A 2015 survey concluded that only five percent of Japanese respondents knew a great deal about Japan's twentieth century wars.<sup>204</sup> Japan's history of

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<sup>201</sup> The Occupations efforts to move textbook decisions from the national to the local level was not successful. See Masayuki Uchino, *The Struggle for Educational Freedom, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY* 115, 117–118 (Yoichi Higuchi ed., 2001); see also CHRISTOPHER BARNARD, LANGUAGE, IDEOLOGY, AND JAPANESE HISTORY TEXTBOOKS 10–12 (2003); YOSHIKO NOZAKI, WAR MEMORY, NATIONALISM AND EDUCATION IN POSTWAR JAPAN, 1945–2007: THE JAPANESE HISTORY TEXTBOOK CONTROVERSY AND IENAGA SABURO'S COURT CHALLENGES 13–25 (2008) (ebook); JAMES L. MCCLAIN, JAPAN: A MODERN HISTORY 592–593 (2002); Editorial, *Dark facts in Japan's history all the more important to keep in schoolbooks*, ASAHI SHIMBUN (2015), <http://ajw.asahi.com/article/views/editorial/AJ201501220036>; Hane & Perez, *supra* note 3, at 448–449.

<sup>202</sup> Okinawans objected and protested when the Ministry of Education sought to delete from textbooks references to the Military's role in civilian suicides during the Battle of Okinawa. The Ministry backed down. See Isabel Reynolds, *Okinawans urge textbook "truth" on WW2 suicides*, REUTERS (Oct. 3, 2007), <http://uk.reuters.com/article/2007/10/03/uk-japan-okinawa-suicide-idUKT1253320071003>; Norimitsu Onishi, *Japan texts note army's role in suicides*, CHICAGO TRIBUNE (Dec. 27, 2007), [http://articles.chicagotribune.com/2007-12-27/news/0712260467\\_1\\_suicides-textbooks-okinawa](http://articles.chicagotribune.com/2007-12-27/news/0712260467_1_suicides-textbooks-okinawa).

<sup>203</sup> See Alexander Martin, *U.S. Publisher Rebuffs Japan on 'Comfort Women' Revision 'Scholars Aligned Behind Historical Fact' of Forced Prostitution, McGraw-Hill Education Says*, WALL ST. J. (Jan. 15, 2015), <http://www.wsj.com/articles/u-s-publisher-rejects-japan-over-textbook-on-comfort-women-1421299438>; Justin McCurry, *Japan urges US publisher to remove comfort women from textbooks*, GUARDIAN (Jan. 15, 2015), <http://www.theguardian.com/world/2015/jan/15/japan-urges-us-publisher-delete-references-comfort-women>; Hajimu Takeda, *Ministry contacts foreign correspondent about source in 'comfort women' article*, ASAHI SHIMBUN (Apr. 28, 2015), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201504280084](http://ajw.asahi.com/article/behind_news/politics/AJ201504280084).

<sup>204</sup> See, e.g., Yomiuri Shimbun, *Poll: 81% regard Japan as 'peace-loving nation'*, JAPAN NEWS (Feb. 25, 2015), <http://the-japan-news.com/news/article/0001958156>; Hiroshi Mitani, *Writing History Text Books in Japan, in HISTORY TEXTBOOKS AND THE WARS IN ASIA: DIVIDED MEMORIES* 193, 201–202 (Gi-Wook Shin & Daniel C. Sneider, eds., 2011) (ebook); Mark Driscoll, *Kobayashi Noshinori is Dead: Imperial War/Sick Liberal Peace/Neoliberal Class War, in 4 MECHADEMIA: WAR TIME* 290, 299–300 (Frenchy Lunning ed., 2009) (ebook); Linda Sieg, *Okinawa furious at Japan's war suicide revision*, REUTERS (June 22, 2007), <http://www.reuters.com/article/2007/06/22/us-japan-okinawa-suicides-idUST29903020070622>; Norimitsu Onishi, *Japan's Textbooks Reflect Revised History*, NEW YORK TIMES (Apr. 1, 2007), [http://www.nytimes.com/2007/04/01/world/asia/01japan.html?\\_r=0](http://www.nytimes.com/2007/04/01/world/asia/01japan.html?_r=0); *Texts to restore Army Okinawa Mass Suicide Role*, JAPAN TIMES (Oct. 19, 2007), <http://www.japantimes.co.jp/news/2007/10/19/national/texts-to-restore-army-okinawa-mass-suicide-role/#.VZq34rnbLIV>.

dealing with reporters who contest the government's view<sup>205</sup> and its efforts to suppress and hide inconvenient historical facts (such as its continued denial of the terms of a side agreement with the United States concerning Okinawa—even after the United States had declassified and made the agreement public), as well as its increased use of State Secrets laws to place government documents out of reach, casts a dark shadow on what could be censored in the name of public order.<sup>206</sup> Even the Constitutional Referendum Law, which sets the conditions for a referendum on constitutional changes voted by a two-thirds majority of each house, restricts free speech dealing with amendments pending Congressional votes. Special permanent residents are prohibited from speaking out against constitutional changes by advising their neighbors what the effect of amendments on non-citizens could be.<sup>207</sup> The LDP-contemplated amendment would give government a free hand to legislate and administratively define the public interest and public order which speech, press, and association could not challenge.

v. *Making the Family the Basic Unit of Society and Requiring Family Members to Take Care of Each Other*

Under the *ie* family system, the extended clan family was the basic unit of society. As a consequence, marriage was arranged between families. Article 24 of the Constitution changed this by making marriage dependent on the consent of the two sexes and by seeking to establish equality between husband and wife as the basis for laws dealing with marriage, family

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<sup>205</sup> See, e.g., *Nishiyama Official Secrets Case, Nishiyama v. Japan*, 32 Keishu 457 (Sup. Ct., P.B. May 31, 1978); Ayako Mie, *Ex-Mainichi reporter blasts Abe's push for secrets bill*, JAPAN TIMES (Nov. 15, 2013), <http://www.japantimes.co.jp/news/2013/11/15/national/ex-mainichi-reporter-blasts-abes-push-for-secrets-bill/#.Vqle74f2bIV>.

<sup>206</sup> Jiji Press, *Japan documents classified as state secrets up over a third in 2015, top 272,000*, JAPAN TIMES (Apr. 27, 2016), <http://www.japantimes.co.jp/news/2016/04/27/national/crime-legal/japan-documents-classified-state-secrets-third-2015-top-272000/#.V-dIDJMrKqC>; *Documents Concerning Secret Pacts Missing*, YOMIURI (Jan. 13, 2010), <http://www.yomiuri.co.jp/dy/national/20100113TDY02308.htm>; *Secret Pact Files Probably Shredded*, ASAHI SHIMBUN (Mar. 20, 2010), <http://www.asahi.com/english/TKY201003180400.html>; *Okinawa reversion papers 'likely destroyed': Documents disposed of to avoid exposing details: court*, JAPAN TIMES (July 14, 2014), <http://www.japantimes.co.jp/news/2014/07/14/national/okinawa-reversion-papers-likely-destroyed/#.Vled53arTIU>.

<sup>207</sup> While political participation such as by voting or running for office may be limited to citizens, speech concerning the effect of laws or constitutional change is not political participation. It is speech whose ideas can be accepted or rejected by the voting public, i.e. citizens. See PAUL CLOSE & DAVID ASKEW, *ASIA PACIFIC AND HUMAN RIGHTS: A GLOBAL POLITICAL ECONOMY PERSPECTIVE* (2004).

obligations, and inheritance.<sup>208</sup> Passage of the amendment would not only provide a pathway to revive *Kokutai*, but would remove the constitutional prohibition against legislation promoting the recreation of a twenty-first century feudal *iye* for all Japanese families.<sup>209</sup>

The Japanese negotiators objected strenuously to the substance of the American-drafted Constitution as it affected the individual and the family as they sought to retain the *iye* system.<sup>210</sup> While the 1947 Constitution replaces the clan with the nuclear family, retention of the family register, which retains the house terminology and requires that there be a head of house, and inheritance laws that are linked to family and ancestor worship, allow the idea of the *iye* to remain.<sup>211</sup>

Unlike the Universal Declaration of Human Rights [hereinafter “Universal Declaration”], which recognizes the individual as a prime holder of human rights and the family as “the natural and fundamental group unit of society,” the LDP contemplates making the family the “basic unit of society,”<sup>212</sup> rather than simply the preeminent or fundamental group unit in

<sup>208</sup> Raising the question whether only heterosexual marriage has been constitutionalized in Japan.

<sup>209</sup> Legislation will likely answer questions raised by the amendment such as whether the family will remain the nuclear as distinguished from clan family; will it include de facto families or only families that are recorded in the Family Register, etc., opening the door to recreation of the prewar family that placed women in their historic role as “good wife and wise mother.” See BRIAN J. MCVEIGH, NATIONALISMS OF JAPAN: MANAGING AND MYSTIFYING IDENTITY 219–239 (2006). A government minister’s comments that could be interpreted as blaming women for Japan’s declining population, likely echoes the “good wife and wise mother” ethic and is consistent with earlier statements by Japanese leaders such as that the declining birth rate was caused by the fact that Japanese women were highly educated. *Women Could Contribute to Japan by Having Children: Top Gov’t Spokesmen*, MAINICHI (Oct. 2, 2015), <http://mainichi.jp/english/english/newsselect/news/20150930p2a00m0na009000c.html>; Halloway, *infra* note 214, at 4; see also Sumiko Sekiguchi, *Confucian Morals and the Making of a ‘Good Wife and Wise Mother’: From ‘Between Husband and Wife there is Distinction’ to ‘As Husbands and Wives be Harmonious’*, 13 SOC. SCI. JAPAN J. 95, 110 (2010) (using the Imperial Rescript on Education as its guide good wives were obedient to their husband and there was division of labor between husband and wife - he pursuing matters outside the home and she matters inside the home); Koyama Shizuko and Gabriel A. Sylvain, *The “Good Wife and Wise Mother” Ideology in Post-World War I Japan*, 7 U.S.-JAPAN WOMEN’S JOURNAL, English Supplement 31 (1994) (adding to a woman’s inside the home function the housewife ideal while permitting her outside activities that did not interfere with housewife obligations and arguing that notwithstanding women’s entry into the work force the concept resonated in 1994 Japanese society).

<sup>210</sup> See KYOKO INOUE, *supra* note 8.

<sup>211</sup> FUMIE KUMAGAI & HIKARU SUZUKI, THE PRICE OF DEATH: THE FUNERAL INDUSTRY IN CONTEMPORARY JAPAN 32–33 (2000); see also, Christopher S. Thompson, *Book Review*, 10 SOC. SCI. JAPAN J. 131–134 (2007) (reviewing YUKIKO NAGANO, GENDAI NOSON NI OKERU IE TO JOSEI: SHONAI CHIHO NI MIRU REKISHI NO RENZOKU TO DANZETSU [I.E. AND WOMEN IN MODERN RURAL SOCIETY: CONTINUITY AND DISCONTINUITY IN THE HISTORY OF THE SHONAI DISTRICT, YAMAGATA PREFECTURE], (Tosui Shobo, 2005) (discussing the continuing effect of the feudal *iye* on Japanese family law.)

<sup>212</sup> Cf. Universal Declaration of Human Rights, [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), with Young Lawyer’s Association for The Future of Freedom translation, *supra* note 13; Voices of Overseas Youth for Civic

the class of numerous group units of society, while at the same time denigrating the individual from its role as prime holder of rights. The Universal Declaration recognizes that in the hierarchy of units (employment group, social club group, university class and/or alumni group, etc.) the family is particularly important—but not more important than the individuals who make up the family. The contemplated amendment would make the family the fundamental societal unit, displacing the individual as was the case in Tokugawa Japan,<sup>213</sup> and as it was strengthened in Meiji Japan, where the communal family and the Emperor's communal family (i.e., the family State) each replicated the other.<sup>214</sup> This would be consistent with the earlier discussed amendment that would denigrate individual rights by removing individuality from the Constitution. Passage of the amendment would not only provide a pathway to revive *Kokutai*, but would remove the constitutional prohibition against legislation promoting the recreation of a twenty-first century feudal *ie* for all Japanese families.<sup>215</sup>

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Engagement, *supra* note 44. By providing that “everyone” has fundamental human rights and “no one” shall be denied certain rights (e.g., Article 2–15) the Declaration reaffirms individual rights while making the family group (as distinguished from some other group, e.g., the company, school class, national society, etc.) the fundamental group of society in Article 16. The considered amendment to Article 24 would provide that the family, as distinguished from the individuals in both the family and society at large, is the basic unit of society.

<sup>213</sup> For example, criminal law in villages in feudal Japan was enforced by the *goningumi* (five families) system of shared responsibility that made each member of the five family group a guarantor of the good conduct of other group members. DAVID J. LU, *THE DAWN OF HISTORY TO THE LATE TOKUGAWA PERIOD*, 209–210 (1997).

<sup>214</sup> SUSAN D. HALLOWAY, *WOMEN AND FAMILY IN CONTEMPORARY JAPAN* 30–31 (2010).

<sup>215</sup> Legislation will likely answer questions raised by the amendment, such as whether the family will remain the nuclear, as distinguished from clan family; and whether it will include de facto families or only families that are recorded in the Family Register, opening the door to recreation of the prewar family that placed women in their historic role as “good wife and wise mother”. See BRIAN J. MCVEIGH, *NATIONALISMS OF JAPAN: MANAGING AND MYSTIFYING IDENTITY* 219–239 (2004). A government minister's comments that could be interpreted as blaming women for Japan's declining population likely echoes the “good wife and wise mother” ethic and is consistent with earlier statements by Japanese leaders blaming declining birth rate on the fact that Japanese women were highly educated. *Women Could Contribute to Japan by Having Children: Top Gov't Spokesmen*, MAINICHI (Oct. 2, 2015), <http://mainichi.jp/english/english/newsselect/news/20150930p2a00m0na009000c.html>. HALLOWAY, *supra* note 214, at 4; see also Sumiko Sekiguchi, *Confucian Morals and the Making of a 'Good Wife and Wise Mother': From 'Between Husband and Wife there is Distinction' to 'As Husbands and Wives be Harmonious'*, 13 SOC. SCI. JAPAN J. 95, 110 (2010) (using the Imperial Rescript on Education as its guide, good wives were obedient to their husbands and there was division of labor between husband and wife, he pursuing matters outside the home, she pursuing matters inside the home); Koyama Shizuko & Gabriel A. Sylvain, *The "Good Wife and Wise Mother" Ideology in Post-World War I Japan*, 7 U.S.-JAPAN WOMEN'S JOURNAL, English Supplement 31 (1994) (adding to a woman's inside-the-home-function the housewife ideal while permitting her to participate in outside activities that did not interfere with housewife obligations and arguing that notwithstanding women's entry into the work force the concept resonated in 1994 Japanese society).

The Imperial Household Law [hereinafter “the Law”] provides a glimpse of what a modern *ie* could look like. The exclusiveness of male imperial succession reflects the *ie* requirement of male inheritance of the head of house mantle to continue the family’s existence.<sup>216</sup> The Law’s requirement that a female of the Emperor’s line who marries outside the imperial line be jettisoned from the imperial family also reflects the feudal *ie*.<sup>217</sup> The imperial family is in some ways a “role model” for the “proper Japanese family.” Its discrimination against female family members and offspring may reflect a societal norm making sexual equality difficult to achieve.

The contemplated amendment would also require family members to care for each other—a reflection of the feudal *ie*. Adoption of the amendment could relieve the government of a serious strain on tax revenues. Care extends beyond finance and includes custodial care, an obligation that falls to women in modern Japan.<sup>218</sup> With an aging and declining population but more female university graduates, some in Japan’s government recognize that women are a viable alternative to importing labor from abroad. An accommodation has been made between those in the ruling elite who consider women as “baby making machines” and those who see them

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<sup>216</sup> FUMIE KUMAGAI & DONNA J. KEYSER, UNMASKING JAPAN TODAY: THE IMPACT OF TRADITIONAL VALUES ON MODERN JAPANESE SOCIETY 15–16 (1996). Male primogeniture, under which the eldest son inherited the head of house position, was part of the *ie*. WILLIAM NOEL, THE RIGHT TO LIFE IN JAPAN 60 (1997). Meiji Japan allowed a female to inherit the head of house status if there were no male heirs.

<sup>217</sup> THE IMPERIAL HOUSE LAW, art. 12, <http://www.kunaicho.go.jp/e-kunaicho/hourei-01.html>. As a consequence, her children are not in the line of succession. Emperor Akihito has two sons and a daughter. His married daughter is no longer in the Imperial family; any children she may have will not be in the Imperial line. The Crown Prince is married and has a daughter. His younger brother was the father of two girls when the daughter of the crown prince was born. Dynastic succession was at risk as surrogate pregnancy, birth to a concubine, or adoption is not allowed for succession. Amendment of The Imperial House Law was considered, including allowing females in the imperial family to create cadet families whose male members would be available for succession. Agreement could not be reached. It appears no serious consideration was given to allowing for an Empress (although Article 14 of the Constitution prohibits gender discrimination in political, economic, or social relations). Consistent with the role of younger sons in feudal Japan to father a standby head of house in waiting, the Crown Prince’s sister-in-law at age 39 delivered a son who is the dynastic successor in the generation after the Crown Prince. The problem may arise again if the young heir apparent after the Crown Prince fails to produce a male heir. WINKLER, *supra* note 78, at 25–35; Colin P.A. Jones, *And then there was one?: Japan’s Right Royal Crisis*, JAPAN TIMES, (Jan. 17, 2012), <http://www.japantimes.co.jp/community/2012/01/17/issues/and-then-there-was-one-japans-right-royal-crisis/#.VG5KyLl0xjo>.

<sup>218</sup> Kumiko Fujimura-Fanselow, *The Japanese Ideology of ‘Good Wives and Wise Mothers’: Trends in Contemporary Research*, 3 GENDER AND HISTORY 345, 348 (1991) (noting that Japanese leaders continue to promote the ideology that care is the provenance of daughters and daughters-in-law). Fujimura-Fanselow also ties the *ie* and imperial Emperor and the House system to the concept of the Good Wife and Wise Mother in the prewar and war period.

as a national resource for other reasons.<sup>219</sup> New laws designed to ease the burden of working women have provided some access to child care centers and maternity and child care leave laws have recently been enacted. Even Japan's definition of gender discrimination has been modified to some degree to relieve the on-the-job burden of working women. These laws have had a positive effect; but waiting lists for child care centers are long<sup>220</sup> and social acceptance is far from universal.<sup>221</sup> Japan's definition of gender discrimination has been moderated in some work settings so that the general rule, which does not recognize gender (or any other) discrimination as long as the law is facially neutral,<sup>222</sup> has been moderated to recognize "indirect discrimination" (what in United States law would be "effect discrimination") when employers use dual track (career/non-career) hiring systems.<sup>223</sup> Adoption of the contemplated amendment will, as a practical if not legal

<sup>219</sup> *Japan women called child machines*, BBC NEWS, (Jan. 27, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/6306685.stm>.

<sup>220</sup> Isabel Reynolds, *Lack of Childcare is Hurting Japanese Push to Put More Women to Work*, BLOOMBERG BUSINESS (Sept. 30, 2015), <http://www.bloomberg.com/news/articles/2015-09-30/japan-s-childcare-backlog-hampers-abe-push-to-put-women-to-work>.

<sup>221</sup> See, e.g., Jonathan Soble, *To Rescue Economy, Japan Turns to Supermom*, N.Y. TIMES, (Jan. 1, 2015), <http://www.nytimes.com/2015/01/02/business/international/in-economic-revival-effort-japan-turns-to-its-women.html?mwrsm=Email&r=0> (noting the difficulty of getting Japanese corporate and societal culture to change and ease the path for working women); Mark Fabian, *Childcare not the only cost for working women in Japan*, EAST ASIA FORUM, (Sept. 16 2014), <http://www.eastasiaforum.org/2014/09/16/childcare-not-the-only-cost-for-working-women-in-japan/>.

<sup>222</sup> For example, since either the husband or wife's family name can be chosen for a family name at marriage, the Family Register Law requirement of a single family name is constitutional notwithstanding that over 95% of Japanese families register under the husband's family name. Tomohiro Osaki, *Japan's top court upholds the same-name rule for married couples, overturns remarriage moratorium for women*, JAPAN TIMES, (Dec. 16, 2015), <http://www.japantimes.co.jp/news/2015/12/16/national/crime-legal/japans-top-court-strikes-rules-divorcee-remarriage/#.VqulDof2bIV>. On its face, the law is neutral – societal pressures likely cause the large difference between men and women. Professional women are especially harmed by the law's requirement that such women choose between marriage under the new husband's surname and the reputation they have established under their father's surname. Many social welfare policies such as the subsidy for large families and health care are linked to and paid to the head of house. These policies disadvantage the wife who finds it difficult to leave an unhappy marriage because benefits flow through the husband. It is reported that in reaching its decision the Court referred to both the societal history of a single family name (this arises from the *ie* clan family system) and also noted that single family names "enable" a person to inform others that they are part of a family. *Id.* Of course, the law does far more than enable people – it requires women to inform others that they are part of their husband's family – as the prewar *ie* required.

<sup>223</sup> Under recent legislation, "indirect discrimination" is recognized so that Japanese employers who employ two track hiring systems (one track for career—management—positions, overwhelmingly held by men, and a second track for non-career positions held by part-timers and contract workers, predominantly women) must prove necessity when adopting: a) height, weight, and strength requirements; b) promotion practices based on experience at multiple locations; and c) willingness to transfer to numerous locations, as condition for career track hiring. These last reflect the cultural imperative that women are expected to stay where the children are and not move the family home. See GOODMAN, *supra* note 88, at 208–211.



matter, further burden women's opportunities in Japan and might set back hard fought gains as women would once again lose their individual rights and be subsumed by their family obligations and second class status within the family.<sup>224</sup>

Making the family the basic unit of Japanese society should not be viewed in isolation. It relates to the contemplated change to remove individuality from the Constitution and to make the Emperor Head of State. Under the *ie*, there was no personal individuality and little individual property. Individuality was lost in the communal body of the clan family where personal attachments, wants, and desires were superseded by the good of the communal family, and after the Restoration, subordinate to the interests of the family State.<sup>225</sup> Removal of individuality and designation of the family as the basic unit of society may be based on a desire to recreate, to the extent possible in a modern world, the *ie* system reestablishing the "pure nature" of the Japanese state that existed in the Meiji period when such purity and *Kokutai* was related to both the family system and rejection of individualism.<sup>226</sup> To those who may seek to return all Japanese to one family under a Head of state emperor, the concept of *ie*, with its ties to ancestor worship as a link to the Emperor, is central to the Family State<sup>227</sup> and *Kokutai*.<sup>228</sup>

vi. *Amendment by Cabinet Declaration? Article 9 and Renunciation of War*

Article 9 of the Constitution is an illustration of "be careful what you wish for, you may get it." In Article 9 Japan renounces war and the threat of force to resolve international disputes.<sup>229</sup> War potential such as the army,

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<sup>224</sup> By placing such a provision in the Constitution, courts likely would be presented with the argument that a statutory requirement of non-sex discrimination in the work environment must be weighed against the constitutional requirement for family care – a woman's duty. Prime Minister Abe's goal is to have women occupy seven percent for national public servants and fifteen percent for local government officials. That goal is nowhere near achievement. Mizuho Aoki, *Japan Drastically Lowers its Goal for Female Managers in Government and Private Sector*, JAPAN TIMES, (Dec. 25, 2015), <http://www.japantimes.co.jp/news/2015/12/25/national/japan-drastically-lowers-its-goal-for-female-managers-in-government-and-private-sector/#.VqvZvYf2bIV>.

<sup>225</sup> Smith, *supra* note 78, at 33; KENNETH B. PYLE, JAPAN RISING 120–125 (2007).

<sup>226</sup> DOWER, *supra* note 85, at 221–223 (discussing the Ministry of Education Manual Cardinal Principles of the National Polity (*Kokutai*)); Fundamentals of Our National Polity, excerpts and discussion at Tsunoda et. al., *supra* note 29, at 278–288.

<sup>227</sup> Kawamura, *supra* note 77, at 156.

<sup>228</sup> QUIGLEY & TURNER, *supra* note 89, at 140, 157.

<sup>229</sup> KENPO, art. 9 provides:

navy, and air force are not to be maintained, and the State's right of belligerency is not recognized.<sup>230</sup> No mention is made of Japan's right to defend itself against outside attack or to enter into mutual or collective defense treaties.

At the start of the Occupation, disarmament and policies that prevented Japan from again becoming a military power was uppermost in the mind of the Occupation. The Initial Post Surrender Policy Directive (IPS Directive JCS1380/15) called for Japanese demilitarization and disarmament.<sup>231</sup> The Cold War changed the geopolitical situation and as United States policy towards the Far East and as the perceived Soviet threat developed, Article 9 became an impediment to America's containment policy.<sup>232</sup>

The Ashida Amendment to Article 9, which added language that hinged the prohibition of a Japanese military force to aspiration for international peace and also hinged the prohibition of military force to carrying out the aims of international peace, made room for the argument that it is an aggressive military rather than a defensive military that is prohibited.<sup>233</sup> Prohibiting aggression is consistent with the Kellogg Briand Pact, a source from which the concept of Renunciation of War was borrowed.<sup>234</sup> Article 9 has been interpreted by the Japanese government to

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Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The Ashida Amendment adopted by the Diet and accepted by the Occupation consists of the 11 words of the first paragraph (*Aspiring sincerely to an international peace based on justice and order,*) and the first 10 words of the second paragraph (*In order to accomplish the aim of the preceding paragraph,*).

<sup>230</sup> *Id.*

<sup>231</sup> JOINT CHIEFS OF STAFF, BASIC DIRECTIVE FOR POST-SURRENDER MILITARY GOVERNMENT IN JAPAN PROPER (Nov. 3, 1945) <http://www.ndl.go.jp/constitution/e/shiryu/01/036/036tx.html>.

<sup>232</sup> HOWARD B. SCHONBERGER, AFTERMATH OF WAR 240–278 (1989).

<sup>233</sup> The Ashida Amendment added the following language to the American draft. Article 9 as set out in KENPO *supra* note 229: “Aspiring sincerely to an international peace based on justice and order,” and “In order to accomplish the aim of the preceding paragraph.”

<sup>234</sup> The draft Constitution for the Philippines written in 1935 contained a Renunciation of War clause and McArthur's close ties to the Philippines suggest he was aware of the renunciation clause. KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 82–86 (Ray A. Moore trans., 1997); *see also* Office of the Historian, *The Kellogg-Briand Pact, 1928*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1921-1936/kellogg>; Henry Cabot Lodge, *The Kellogg-Briand Peace Pact: A Contemporary Criticism, 1928–29*, TEACHING AMERICAN HISTORY (Dec. 1928),

permit Japan's Self Defense Force (SDF), although the role of the SDF is restrained by the Constitution, legislation, and administrative opinion by the Cabinet Legislation Bureau (CLB), the organ of government with responsibility to advise the government (i.e., the Cabinet) concerning whether legislation or administrative action is consistent with the Constitution.<sup>235</sup> CLB is a standalone government bureau under the Prime Minister; the opinions of the CLB are given great weight by all branches of the government—legislative, executive and judicial. It has been suggested that opinions of the CLB are so significant that the Supreme Court of Japan follows them rather than its own view.<sup>236</sup> Recent debate in Japan has focused not on the legality of the existence of the SDF but on what use may be made of such force, where it may be deployed, who it may defend, what weapons it may possess, and how much force it can apply.

The Abe Administration initially sought to amend Article 9 by way of a two-step process. In the first step, Article 96 (the amendment Article) would be changed to require only a majority vote of each Diet house to send amendments to referendum; once that was achieved, step two would be to significantly amend Article 9.<sup>237</sup> When polls indicated the Japanese public would not support this path, the debate shifted from formal amendment to achieving the government's objective by the Government simply adopting a new and different interpretation of Article 9.<sup>238</sup> Assuming interpretation sufficient, the debate shifted to what was the relevant body to make such new interpretation. The competing bodies were the CLB and the Cabinet.

Consistent with Japanese government policy to use Article 9 to limit Japan's military budget and commitments to allied countries such as the

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<http://teachingamericanhistory.org/library/document/the-kellogg-briand-peace-pact-a-contemporary-criticism-1928-29/>.

<sup>235</sup> The Supreme Court of Japan has never directly addressed the question of the constitutionality of the SDF, avoiding the issue through procedural doctrines although dicta indicate the SDF is constitutional. Questions concerning the scope and limitations on the SDF have been opined on by the CLB. *See About the Cabinet Legislation Bureau*, Cabinet Legislation Bureau, <http://www.clb.go.jp/english/about.html>.

<sup>236</sup> Jonathon David Marshall, *Democratizing the Law in Japan*, in *ROUTLEDGE HANDBOOK OF JAPANESE POLITICS* 92, 94 (Alisa Gaunder, ed., 2011); Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 *LOY. L. REV.* 603, 605, 624–625 (2008).

<sup>237</sup> This had the advantage of using fear of an assertive and resurgent China and a reclusive but nuclear North Korea to rid the Constitution of both the two-thirds threshold required by Article 96 and to “liberate” Japan from restrictions on its use of military forces.

<sup>238</sup> Jeremy A. Yellen, *Shinzo Abe's Constitutional Ambitions*, *THE DIPLOMAT*, (June 12, 2014), <http://thediplomat.com/2014/06/shinzo-abes-constitutional-ambitions/>.

United States,<sup>239</sup> the CLB had previously opined that Article 9 limited military action to the minimum necessary for Japan's defense and that collective self-defense was not permitted.<sup>240</sup> To achieve a shift in the CLB's interpretation, Prime Minister Abe filled a vacancy on the Supreme Court with the head of the CLB (who opposed reinterpretation of Article 9) and then appointed a non-CLB member (who favored changing the interpretation of Article 9) to head the CLB.<sup>241</sup> When the new head became seriously ill, the government changed its approach to one that rejected a role of the CLB in the interpretation question and instead relied on a new Cabinet interpretation of Article 9.<sup>242</sup>

A "Cabinet Declaration" is not mentioned in the Constitution, which makes the Diet, not the Cabinet, the highest and sole law-making branch of the State.<sup>243</sup> The Cabinet declared that Article 9 permitted the SDF to engage in collective self-defense, i.e., to aid other countries in certain circumstances, including military attack on the assets of such foreign nations and other circumstances that endangered the Japanese population's pursuit of happiness.<sup>244</sup> An embargo of oil such as the pre-Pacific War American

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<sup>239</sup> See Michael J. Green, *The US-Japan Alliance: A Brief Strategic History*, 12 EDUC. ABOUT ASIA 25 (2007).

<sup>240</sup> PYLE, *supra* note 225, at 236, 254–255; EMMA CHANLETT-AVERY & IAN E. RINEHART, CONG. RESEARCH SERV., RL33740, THE U.S.-JAPAN ALLIANCE, (2016), available at <https://fas.org/spp/crs/row/RL33740.pdf>; see also Michael Green, *The Challenges of Managing US-Japan Security Relations after the Cold War*, in NEW PERSPECTIVES ON U.S.-JAPAN RELATIONS 241 (Gerald L. Curtis ed. 2000), [http://www.jcie.org/researchpdfs/NewPerspectives/new\\_green.pdf](http://www.jcie.org/researchpdfs/NewPerspectives/new_green.pdf).

<sup>241</sup> Yellen, *supra* note 238.

<sup>242</sup> Reiji Yoshida, *Abe's man in Cabinet law office steps down*, JAPAN TIMES, (May 16, 2014), <http://www.japantimes.co.jp/news/2014/05/16/national/politics-diplomacy/cabinet-law-office-shake-slow-abes-military-drive/#.U-GPFSx0wdU>.

<sup>243</sup> "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (Japan). The Diet is the organ of the State whose entire membership is elected by the people. Only a majority of the Cabinet need be elected members of the Diet, and all Cabinet members are appointed by the Prime Minister, who has authority to remove them at will: "[t]he Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet. The Prime Minister may remove the Ministers of State as he chooses." *Id.* art. 68.

<sup>244</sup> Three conditions for exercising collective self-defense were placed in the Declaration: 1) a clear threat to Japan and/or its peoples' rights to life, liberty or pursuit of happiness; 2) collective self-defense must be the only alternative available; 3) force is limited to minimum necessary force. CHANLETT-AVERY & RINEHART, *supra* note 240, at 4; see also Jeff Kingston, *Commentary, Abe's constitutional putsch and U.S. security cooperation*, JAPAN TIMES, (July 12, 2014), <http://www.japantimes.co.jp/opinion/2014/07/12/commentary/abes-constitutional-putsch-u-s-security-cooperation/#.U-FqiSx0wdU>.

Embargo or a cut off of oil supplies from the Persian Gulf that could be interpreted to endanger the public's right to happiness might suffice to set aside Article 9's Renunciation of War Clause.<sup>245</sup> No opinion of the CLB on the constitutionality of such declaration was sought and when the CLB was presented with the declaration it took no formal action and kept no notes of any discussions it may have had concerning the declaration<sup>246</sup> (although there is strong argument that Japan's public records law requires the keeping of such notes) apparently simply accepting it as a *fait accompli*.<sup>247</sup> The Diet (controlled by the LDP and Komeito) then adopted legislation expanding the role of the SDF in accord with the declaration.

The declaration does not contain a NATO type "attack on one is an attack on all" commitment and leaves to Japan's government both the ultimate questions of whether an attack on a country allied with Japan meets the Cabinet declaration's required clear threat to Japan's sovereignty or the right of its people to pursue happiness and the level of military action Japan may take in response.<sup>248</sup> The declaration is supportive of United States policy and the Japan/U.S. Alliance and was welcomed by United States

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<sup>245</sup> Prime Minister Abe has suggested Japan could use mine sweepers as part of collective self-defense if mines interrupted global oil supplies interfering with citizen's pursuit of happiness. *Collective defense right limited: Abe*, JAPAN NEWS (July 14, 2014), <http://the-japan-news.com/news/article/0001423669>. The defense of some of the defendants at the Tokyo War Crimes Trial was based, in part, on the assertion that the United States rather than Japan began the Pacific War as the U.S. embargo of high octane aviation fuel was an act of economic warfare. For more on Koichi Kido's use of this defense argument at the War Crimes Trial, see EDWARD J. MILLER, *BANKRUPTING THE ENEMY* 242 (2007). This argument disregards the actions of Japan leading up to the embargo (Japan's aggressive war in China and Japanese expansion to French Indochina) and disregards the difference between a blockade, which is an Act of War because it relies on belligerency, i.e., military force, to prevent willing sellers from selling product to a belligerent, while an embargo is a country's voluntary restriction of its own actions and the actions of those subject to its domestic law from exporting product to a foreign state. At the time of the U.S. embargo, there was no international agreement between Japan and the United States that required the United States to permit its nationals to trade with Japan. There is no rule of international law that requires a country, absent a treaty obligation to the contrary, to cede its freedom to refuse to trade with another country because the other country "needs" the products the embargoing country refuses to sell. Abe's comment echoing Japan's prewar actions reflects a theory of entitlement that international law does not support. See FORREST E. MORGAN, *COMPELLENCE AND STRATEGIC CULTURE OF IMPERIAL JAPAN* 174 (2003).

<sup>246</sup> *Cabinet Legislation Bureau has no record of Constitution reinterpretation deliberations*, MAINICHI (Sept. 21, 2015), <http://mainichi.jp/english/english/newsselect/news/20150928p2a00m0na035000c.html>.

<sup>247</sup> *Government skipped recording debate over constitutional reinterpretation*, JAPAN TIMES (Sept. 28, 2015), <http://www.japantimes.co.jp/news/2015/09/28/national/politics-diplomacy/government-skipped-recording-debate-over-constitutional-reinterpretation/>.

<sup>248</sup> North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

officials.<sup>249</sup> The declaration and security legislation passed to carry out the declaration may reflect a break with Japan's historic use of Article 9 to limit its commitments to allies (the United States in particular). It is an advance towards the United States objective of a truly mutual defense agreement and mutual defense commitments between the United States and Japan which permits Japan to shoot down missiles headed toward the United States and defend United States military assets.<sup>250</sup> It also reflects a Japan that has become much more involved with like-minded countries, i.e., those concerned about China.<sup>251</sup> While retaining the importance of self-defense (i.e., defense of Japanese territory or its people) as a prerequisite for Japanese military action,<sup>252</sup> adoption of a collective self-defense posture is a

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<sup>249</sup> *Hagel Welcomes Japan's New Collective Self-defense Policy*, U.S. DEP'T OF DEF. NEWS (July 1, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=122591>; CHANLETT-AVERY & RINEHART, *supra* note 240, at 4.

<sup>250</sup> The issue of how far the Cabinet Declaration permits Japanese military action is one for the Japanese government to decide. The joint U.S.-Japan military guidelines were amended in April 2015. *Guidelines for Japan-U.S. Defense Cooperation*, U.S.-Japan (April 27, 2015), [http://www.us.emb-japan.go.jp/english/html/Guidelines\\_for\\_Japan\\_US\\_Defense\\_Cooperation.pdf](http://www.us.emb-japan.go.jp/english/html/Guidelines_for_Japan_US_Defense_Cooperation.pdf); *see also* Kyle Mizokami, *Inside the New U.S.-Japan Defense Guidelines*, USNI NEWS (April 29, 2015), <https://news.usni.org/2015/04/29/inside-the-new-u-s-japan-defense-guidelines>. The revised guidelines take into account Japan's new approach to collective self-defense and joint Naval Operations and Drills undertaken by Japan, and the United States will help interpret (and perhaps expand) the Guidelines. *See* Bruce Klingler, *Japanese Defense Reform Supports Allied Security Objectives*, BACKGROUNDERS (The Heritage Foundation) (Jan. 11, 2016), <http://www.heritage.org/research/reports/2016/01/japanese-defense-reform-supports-allied-security-objectives>.

<sup>251</sup> *See, e.g.*, Brahma Chellaney, *China pushes natural allies India, Japan closer to US*, THE SUNDAY GUARDIAN (May 30, 2010), <http://www.sunday-guardian.com/analysis/china-pushes-natural-allies-india-japan-closer-to-us>; Mina Pollmann, *Japan and India's Warming Defense Ties*, THE DIPLOMAT (Mar. 4, 2015), <http://thediplomat.com/2015/03/japan-and-indias-warming-defense-ties/>; Prashanth Parameswaran, *Japanese Destroyers Visit Vietnam's Cam Ranh Bay in Historic Move*, THE DIPLOMAT (Apr. 13, 2016), <http://thediplomat.com/2016/04/japanese-destroyers-visit-vietnams-cam-ranh-bay-in-historic-move/>; Kim Gamel, *US, South Korea and Japan to Hold Anti-Missile Exercise*, STARS AND STRIPES (May 16, 2016), <http://www.stripes.com/news/pacific/us-south-korea-and-japan-to-hold-anti-missile-exercise-1.409754>.

<sup>252</sup> Green, *supra* note 239. It must be emphasized that in determining what collective self-defense actions are permitted by the Declaration restrictions in the Declaration and legislation still contain restraints on the use of the military (e.g., minimum force necessary). *See To win over Komeito, LDP modifies rules for Japan's use of force*, NIKKEI ASIAN REVIEW (June 24, 2016), <http://asia.nikkei.com/Politics-Economy/Policy-Politics/To-win-over-New-Komeito-LDP-modifies-rules-for-Japan-s-use-of-force>. Such restraints reinforce the "go slow" attitude Japan's political leaders have endorsed for seventy years, raising questions about how much collective self-defense Japan will actually exercise when and if assets of a country close to Japan (e.g., the United States) are attacked. *See* Adam P. Liff, *Japan's Defense Policy: Abe the Evolutionary*, 38 THE WASH. Q. 79, 85-92, 94 (2015); *see also* Michael Green and Jeffrey W. Hornung,



significant break from Japan's postwar past. At the same time, Japan's government is also taking action to scale back the role of civilian watchdogs while increasing the authority of military officers.<sup>253</sup> This may make it easier and faster for Japan to come to the aid of an allied country but it reduces civilian control over the military.

The Cabinet declaration raises severe rule of law questions,<sup>254</sup> especially as the declaration route replaced a legal opinion<sup>255</sup> without providing any reasoned explanation of why the interpretation of Article 9 accepted by governments headed by LDP as well as other political parties for seventy years and supported by opinions of the CLB has suddenly changed.<sup>256</sup> By avoiding use of the Amendment Article (Article 96) to change the meaning of Article 9, Japan's government has engaged in a form of "stealth amendment" of the Constitution, depriving the people of their right to be protected against Government action changing long established principles set out in the Constitution.<sup>257</sup> If seventy years of consistent constitutional interpretation by the government and the bureau with responsibility for giving constitutional interpretations that conditions the

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*Ten Myths About Japan's Collective Self-Defense Change*, THE DIPLOMAT (July 10, 2014), <http://thediplomat.com/2014/07/ten-myths-about-japans-collective-self-defense-change/>.

<sup>253</sup> *Defense Ministry's new SDF planning procedures give uniformed personnel more control*, MAINICHI (Mar. 12, 2016), <http://mainichi.jp/english/articles/20160312/p2a/00m/0na/021000c>; Nina Pollmann, *Japan's Defense Ministry Seeks to Roll Back Civilian Control*, THE DIPLOMAT (Feb. 28, 2015), <http://thediplomat.com/2015/02/japans-defense-ministry-seeks-to-roll-back-civilian-control/>.

<sup>254</sup> See, e.g., Craig Martin, *The Case Against Revising Interpretations of the Japanese Constitution*, 5 THE ASIA-PAC. J.: JAPAN FOCUS 1 (2007), <http://apjif.org/-Craig-Martin/2434/article.html>.

<sup>255</sup> See, e.g., Kan Hideki, *U.S. Global Strategy and Japan's Right to Exercise Collective Self-Defense: A Historical Perspective*, 37 NANZAN REV. OF AM. STUD. 71 (2015).

<sup>256</sup> For example, there was no effort by the Cabinet to show that the original intent of the Constitution drafters was to allow collective self-defense or that the purpose of Article 9 would be better served by the new interpretation (neither could be shown as the original intent was to renounce war and have no Army, Navy or Air Force and the purpose of Article 9 was to protect the United States and its Allies of the day (which at the close of the War included China and the Soviet Union) from a militarily armed Japan) nor was the interpretation designed to read Article 9 in a way that comports with the modern view of the Japanese public, a kind of "national ethos." The public had rejected amendment of Article 96 to allow a change in Article 9 to be presented to the people for a referendum vote by a majority vote of both houses of the Diet leaving the LDP with the Cabinet declaration alternative to achieve the LDP's purpose. Demonstrations against the security laws based on the new interpretation show that the public is hardly convinced that the new interpretation reflects their view of Japan as a pacifist country. See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 18, 35-6 (1990).

<sup>257</sup> Cf. Aurelia George Mulgan, *Ishihara's Stealth Attack on the Japanese Constitution*, THE DIPLOMAT (Nov. 8, 2014), <http://thediplomat.com/tag/shintaro-ishihara/>; Richard Albert, *Constitutional Amendment by Stealth*, 60 MCGILL L.J. 673 (2015), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1944&context=lsfp>.

military to self-defense and thus the Ashida Amendment can be blinked away by the declaration of the executive branch acting on its own, can such declarations be used to “amend” other constitutional provisions such as the freedoms and rights provisions of the Constitution? If so, what is the function of a written constitution’s Bill of Rights and amendment provisions and how does the public cabin Cabinet declared interpretations? The history of Article 9 has been a history of incremental interpretations expanding the role of Japan’s Self Defense Force but never tampering with the self-defense rationale for the forces existence and use. Does this history make interpretation of Article 9 *sui generis*?<sup>258</sup> Of course, a party with a legal injury caused by government action and standing to sue may seek a judicial determination that such action (not raising a political question) should be set aside as unconstitutional. Japan’s Supreme Court is specifically given constitutional judicial review authority<sup>259</sup> but rarely exercises it.<sup>260</sup>

In the run up to the legislation carrying out the Cabinet Declaration a Supreme Court Justice,<sup>261</sup> a former Chief Justice,<sup>262</sup> as well as three constitutional scholars invited to testify before a Diet Committee (including one who the LDP had asked to testify) opined that the legislation was unconstitutional.<sup>263</sup> The Supreme Court of Japan, using procedural doctrines, has never directly addressed the question of the constitutionality

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<sup>258</sup> Navraj Singh Ghaleigh, *Neither Legal Nor Political? Bureaucratic Constitutionalism in Japanese Law*, 26 KING’S LAW JOURNAL 193 (2015).

<sup>259</sup> “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan).

<sup>260</sup> See CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 110–25 (3d ed. 2012).

<sup>261</sup> *Amendment ‘needed’ for shift on self-defense*, JAPAN TIMES (Aug. 21, 2013), <http://www.japantimes.co.jp/news/2013/08/21/national/amendment-needed-for-shift-on-self-defense/#.VXhAc7nbLIV>.

<sup>262</sup> *Ex-Supreme Court chief justice raps Abe’s security reforms*, JAPAN TIMES (Sept. 4, 2015), <http://www.japantimes.co.jp/news/2015/09/04/national/politics-diplomacy/ex-supreme-court-chief-justice-raps-abes-security-reforms/#.V8tfyVdiNmA>.

<sup>263</sup> *Former Cabinet Legislation Bureau chiefs criticize security bills*, MAINICHI (June 23, 2015); Mari Yamaguchi, *Constitutional questions grow over Japan PM’s military plans*, MILITARY TIMES (June 10, 2015), <http://www.militarytimes.com/story/military/2015/06/10/constitutional-questions-grow-over-japan-pms-military-plans/71010438/>; Tetsuya Watanabe, *Triple shot: Scholars say security legislation ‘unconstitutional’*, ASAHI SHIMBUN (June 5, 2015); *Security bills’ handling worries LDP: Scholar’s testimony a surprise ‘gift’ to DPJ in security debate*, THE DAILY YOMIURI (June 7, 2015); Reiji Yoshida, *Experts’ tongue-lashing rekindles Diet debate on reinterpreted Constitution*, JAPAN TIMES (June 5, 2015), <http://www.japantimes.co.jp/news/2015/06/05/national/politics-diplomacy/experts-blast-constitutional-reinterpretation-lower-house-session/#.V4eSho-cHIV>.

of the SDF; although Supreme Court dicta indicate the SDF is constitutional. Considering the Court's reticence to deal with constitutional issues the CLB has taken this role and is considered by some as a guardian of the Constitution.<sup>264</sup> Considering the Supreme Court of Japan's deferential approach to constitutional issues (including those surrounding Article 9) and the role of the CLB in constitutional interpretation it is fair to ask whether positions taken by the CLB in early opinions are entitled to a kind of "stare decisis" affect at least until set aside by a new reasoned CLB opinion or the judiciary or at least a reasoned legal explanation by the government.<sup>265</sup> Rather than using the means provided by the Constitution to amend the Constitution (or utilizing the CLB to reverse previous CLB opinions based on a reasoned explanation) the LDP has "reinterpreted" Article 9 and while it still wants to amend the language of Article 9, it no longer sees such amendment as a priority. Rather, amendment to Article 9, which was for many years the rallying call for constitutional amendment, can be relegated to a future date, after other amendments have been approved by two-thirds of each Diet and presented to the public for referendum vote.

### III. CONCLUSION

It is well to recall that it is constitutional amendment – a change in the fundamental law that determines the relative powers of the executive, the legislative and the people—not amendment of a statute that the LDP seeks. The amendment language itself will have consequences for the people of Japan that would change their current society, but more significant is the

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<sup>264</sup> *Abe's collective self-defense argument just got shakier*, ASAHI SHIMBUN (Nov. 25, 2015), [http://3coco.org/a/modules/d3pipes\\_3/?page=clipping&clipping\\_id=12447](http://3coco.org/a/modules/d3pipes_3/?page=clipping&clipping_id=12447).

<sup>265</sup> Craig Martin, *Questioning U.S. Support for Japan's National Security Moves*, CRAIG MARTIN: TAKING LAW SERIOUSLY, (Sept. 7, 2015), <http://craigmartin.com/2015/09/questioning-u-s-support-for-japans-national-security-moves/>; Craig Martin, Opinion, 'Reinterpreting' Article 9 endangers Japan's rule of law, JAPAN TIMES (June 7, 2014), <http://www.japantimes.co.jp/opinion/2014/06/27/commentary/japan-commentary/reinterpreting-article-9-endangers-japans-rule-of-law/#.V42BZ4-cFy1>.

The September 11, 2001 terrorist attack on the World Trade Center and Pentagon and the United States response brought the issue of collective action and/or action outside of Japan to the fore. Japan, under United States pressure, provided assistance to American forces in Iraq. Some portions of that assistance were challenged in litigation that ended with a 2010 decision of the high court in Nagoya which dismissed the case on technical grounds but opined in dicta that there had been a constitutional violation. See, *Mōri v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace*, Hudson Hamilton, trans., 19 PAC. RIM L. & POL'Y J. 549 (2010); Allen Mendenhall, *America Giveth, and America Taketh Away: The Fate of Article 9 After the Futenma Base Dispute*, 20 MICH. ST. INT'L L. REV. 83 (2011). High courts and district courts have frequently opined that an action violated the Constitution only to be reversed by the Supreme Court so the dictum is far from definitive.

removal of constitutional barriers to legislation and administrative action that could dramatically and negatively affect the rights, liberties and freedoms of citizens in modern Japan.

The considered amendments discussed in this article would dramatically change the current Constitution from a document designed to limit and regulate the power of the State vis a vis the people, to one that emphasizes both the power and authority of the State and the duties and obligations of citizens to the State as representative of the community of Japanese citizens. The package of amendments the LDP is contemplating and are discussed herein opens a path to reestablishment of the pre-war *Kokutai*, the pre-war *ie* family system, and the pre-war autocratic state. The government would be permitted to determine when and if the public order required limitations on rights mentioned but not guaranteed by the Constitution such as freedom of association and speech. As in pre-war Japan, people could think what they want but the moment they communicated such thoughts or organized to democratically make such thoughts government policy, their “right” could terminate by determination that such actions are not in the public interest or do not support public order.

The problem with the contemplated amendments as a package is not simply that they reject fundamental human rights, free speech, and constitutional limits on the governing elite and Cabinet once an emergency has been declared—all of which are serious problems not to be underestimated—but also that in many respects, the package would bring Japanese governance (and society) back to the undemocratic Meiji Constitution. In doing so, the amendments would sow the seeds for the potential destruction of the form of democracy that the Japanese people are continuing to develop to create a more representative state.<sup>266</sup> As a whole,

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<sup>266</sup> Opinions vary as to whether Japan has a democracy that represents the people. That it holds elections on a regular basis and that the membership of the legislative and executive branches of the government are made up of the winners and appointees of winners of such elections is not denied, and is no small accomplishment. The debate is whether the election process and winners *represent the public* and the public interest. Some argue that Japan's democracy is based on Japanese “groupism” and through these groups people mold, influence and sometimes even change policies. MARY ALICE HADDAD, *BUILDING DEMOCRACY IN JAPAN* (2012). Others question whether citizens' views are taken into account (and if so to what degree) by elected political leaders and the unelected but powerful Bureaucracy. It can be suggested Japan's failure to establish representative government is demonstrated by the continued vitality of the LDP as the major political voice in Japan for sixty years with only three exceptions, two of which were engineered by former LDP politicians, while in the third a non-LDP Socialist Prime Minister led a coalition dominated by and in which LDP policies prevailed. ALISA GAUNDER, *POLITICAL REFORM IN JAPAN: LEADERSHIP LOOMING LARGE* 85–7 (2007). To some, Japan's failure to establish representative government may be attributed to the voters and shared by politicians and/or parties that either do not

the amendments are not an attempt to create a twenty-first century postwar Constitution, but rather to resurrect a flawed nineteenth century Constitution based on myth and dreams of unique superiority.

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articulate or follow policy positions in platforms—with little to no consequence in future elections. YOSHIKI KOBAYASHI, *MALFUNCTIONING DEMOCRACY IN JAPAN* (2012); Colin P.A. Jones, *Japan's Constitution: never amended but all too often undermined*, JAPAN TIMES (Mar. 26, 2014), <http://www.japantimes.co.jp/community/2014/03/26/issues/japans-constitution-never-amended-but-all-too-often-undermined/#.VjUEV4eFPIV>. Japan's failure to create a democracy where parties represent the people may be due to a lack of choice of parties that are seen by the public as capable of governing. McKinstry, *supra* note 62 at 104–9; Emi Sauzier-Uchida, *Why have prime ministers' speeches changed over time? From Eisaku Sato to Shinzo Abe*, THE YOMIURI SHIMBUN (July 27, 2015), [http://www.yomiuri.co.jp/adv/wol/dy/opinion/gover-eco\\_150727.html](http://www.yomiuri.co.jp/adv/wol/dy/opinion/gover-eco_150727.html).